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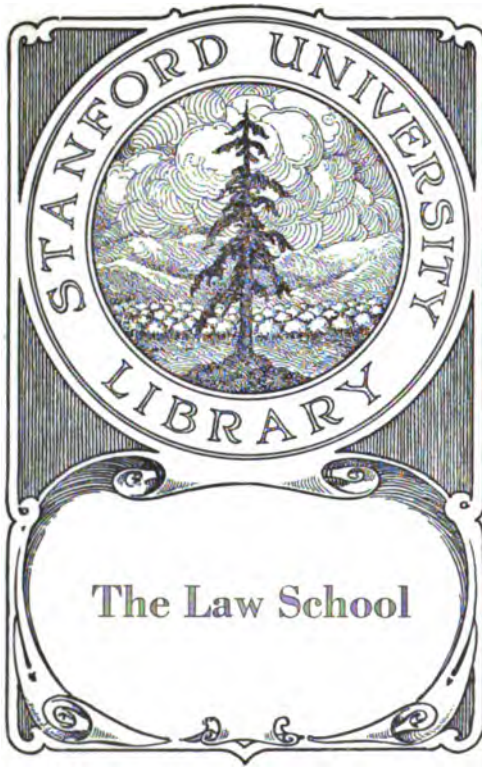
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VOL. V.

IN THE QUARTER SESSIONS OF PHILADELPHIA.

[May Sessions, 1845.]

GUARDIANS OF THE POOR *v.* NATHANS.

1. A wife is a competent witness even to prove the marriage, in a case in which the guardians of the poor are plaintiffs and the alleged husband is defendant, under the act of the 31st of March, 1812.
2. Wherever the marital rights of either party are affected, and the marriage is sought to be established, it may be done by the confessions or admissions of the parties.
3. Cohabitation and acknowledgment are facts showing the mutual consent of the parties to the contract, by proof of which a marriage may be sufficiently established.

PARSONS J. This case comes before us, on the complaint of the guardians for the relief of the poor for this city and the incorporated districts of the county, against Samuel Nathans, for the desertion of his alleged wife Savilla Nathans, and her two infant children, under the provisions of the 6th section of the act of the 31st of March, 1812. When it was first presented for our consideration, a motion was made to quash the proceedings. An opinion in writing was delivered in March last on the various objections then raised, which is published in the 4th volume of the Pennsylvania Law Journal 249, to which a reference is made relative to the view which the court entertain in cases of this description. The cause has been heard upon its merits. The testimony is very voluminous, occupying more than one hundred pages closely written. In giving the reasons for the ultimate determination of the court, it will not be expected that

more of the facts will be introduced into this opinion, than are necessary fully to comprehend the grounds on which the evidence is applied to the rules of law, which it is believed must control the judgment of the court.

The cause has been argued with great ability by the learned counsel representing the respective parties. Numerous authorities have been cited, relative to the law of marriage (which is the main point in the cause), all of which and many more have been attentively examined by the court. The important matter is a correct application of the case before us, to the great and leading principles upon this interesting subject, which seems to have been settled by distinguished judges for many years, and are unaltered by legislative enactments.

It is not denied that the defendant deserted the female who claims to be his wife some time in March, 1844. Nor has it been contended that he is not the father of the two infant children now supported at the public expense; but it is alleged, if he is their father, they are illegitimate, and therefore under this form of proceedings the court can make no order for their maintenance; hence the main question in controversy is that of marriage. Therefore our principal inquiry will be, whether there has been such a contract of marriage proved, as will justify the court in making an order upon the defendant for the support of this woman and her children, instead of casting them upon the charity of the public.

It is not alleged by the counsel for the guardians of the poor, that a contract of marriage was entered into between these parties, by its direct solemnization in the presence of a clergyman of any religious denomination, or before a civil magistrate of this commonwealth, in the manner that most usually attends the formation of such contracts; hence arises the question, what *constitutes*, or to use a more correct legal expression, what *evidences* a marriage known and recognised by the law of this state?

It may become important therefore to consider the ancient general law upon this subject, as well as that of recent adjudication. By the ancient general law of Europe, a contract *per verba de præsenti* constituted a valid marriage without the intervention of a priest, till the time of the council of Trent. The decrees of that council made it a religious ceremony, but they were never received as authority in many countries in Europe. 4 Eccl. Reps. 497. "Our law (says Blackstone),

considers marriage in no other light than as a civil contract." 1 Black. Com. 461. If we trace the history of this title of the law to the early commentators upon the subject, it will be found there is nothing in the nature of the marriage contract which makes it more sacred than that of other contracts, or requires the interposition of a person in holy orders, nor demands that it should be solemnized in a church. All ideas of this kind entertained by any one, have arisen entirely from the usurpation of the church of Rome on the rights of the civilian. Amid her ambitious projects, she claimed the absolute control of marriage, on the ground that it was a sacrament; consequently it belonged wholly to the management of the clergy. I think it will be found that the solemnization of marriage by a clergyman, was a thing unknown among primitive Christians, and that it was first ordered by pope Innocent III. "The only ceremony in practice among them was, for the man to go to the house where the woman dwelt, and in the presence of witnesses to lead her away to his own house." Reev. Dom. Rel. 196; Erskin Jurist 61. Hence, says chancellor Kent, "no peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure genitum*, that consent is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine, that the very foundation and essence of the contract consisted in consent freely given by parties competent to contract. If the contract be made *per verba de præsenti*, or if made *per verba de futuro*, and followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent), cannot dissolve, and it is equally binding as if made in *facie ecclesiæ*." Such was the law which governed marriages in England prior to the marriage act of 26 George II. 2 Kent Com. 86. These principles are fully sustained by numerous English decisions. 4 Eliz. Reps. 485; 20 State Trials 548; 6 Mod. 155; 2 Salk. 437; 4 Cook 29; 1 Dew. 180; 2 Dew. & Clark 265; 2 Dew. 482.

It seems to be clearly settled in the United States, that marriage is but a civil contract, and it is not necessary that a clergyman or magistrate should be present to give validity to the marriage, and if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de*

futuro, and followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent), cannot dissolve; and is equally binding as if made in *facie ecclesiæ*. See 2 Kent 8; 1 Howard 231, *Jewell v. Jewell*; 4 John. 52, *Forten v. Reed*.¹ The question has been very fully considered by the supreme court of this state, and held to be the law here, that marriage is a civil contract, which may be completed by any words in the present time without regard to form; nor is it absolutely necessary to be done before a clergyman or a magistrate. *Hantz v. Seely*, 6 Bin. 407; *Chambers v. Dickson*, 2 Serg. & Rawle 476; 1 Ashmead 274. But while it is held in Pennsylvania, that no public or ecclesiastical agency is requisite to give validity to a marriage; but where a contract is made *per verba de præsenti*, between parties capable of making such a contract, it is valid in law, and must be enforced like any other agreement between the parties, when the rights of individuals thus contracting are controverted, or the demands of third persons affected by such contract are adjudicated upon; still all courts consider it an important and solemn institution, and the manner in which the contract is formed ought to be suitable to the nature and importance of the engagement; and in my opinion, where a marriage contract is attempted to be established without the ceremony usually attendant on the formation of such contracts, a court should examine it with great scrutiny, and require the most satisfactory proof that the sacred agreement of marriage had been entered into with the voluntary consent of the contracting parties. Such being the established law of the state, I will proceed to examine the evidence adduced in the cause, to prove that the marriage contract exists between the defendant and his alleged wife Savilla.

The evidence before us is presented in two aspects. It is first contended by the counsel for the guardians of the poor, that they have proved a contract between the parties, of words in the present time, by which they solemnly and deliberately, in the month of March, 1841, made an agreement of marriage between themselves, and from that moment they became man and wife. Secondly, that they have shown the subsequent acknowledg-

¹ Since this opinion was handed to the editors, I have seen the case of *Taylor*, a lunatic, reported in 9 Paige 611, which I think is conclusive on the question of marriage, and must rule this cause under the facts disclosed by the testimony.

ments of the parties, repeatedly made, that they were married; that they lived and cohabited together as man and wife, and that the marriage is clearly proved by reputation in the neighbourhood, drawn from repeated declarations of the parties, their cohabitation, and other acts inconsistent with any other inference than that of a marriage contract.

The contract of marriage made *per verba de præsenti*, is mainly proved by the testimony of the alleged wife Savilla Nathans; hence arises the question, is she a competent witness to prove the contract in a proceeding by the guardians to compel the husband to contribute for her support? When she was offered as a witness, it was admitted by the counsel for the defendant that she was a competent witness to prove the desertion, but not the marriage. She was first offered by the prosecution before they closed their evidence, and the court waived a decision on that point. After the defendant had closed his testimony, she was again offered as a witness to rebut some matters proved by the defence, and admitted for that purpose, and also to prove the contract of marriage, saying, that as we are to decide law and fact, it should be considered in the same manner that a court of chancery views incompetent testimony, that is, if relevant, to give it all the weight to which it is entitled, and if not, to reject it altogether.

The question of her competency as a witness to prove the marriage, is one of some importance, and demands a careful consideration. It cannot be denied, that in the numerous prosecutions for desertion against husbands which have arisen in this court, the wife has always been admitted as a witness, and she has uniformly been examined as to the marriage and desertion. It has been conceded by the counsel, and is said by my brethren upon the bench, that this is the first case in which this point has ever been mooted in our court. I have therefore devoted considerable attention to it, in order to endeavour to form a correct opinion. After a careful examination of the subject, I am convinced she is a competent witness to prove the marriage. The general rule of evidence on this point is unquestioned, that neither husband or wife is admissible as a witness in a cause, civil or criminal, in which the other is a party. Yet to this general rule there are many exceptions, which, says Mr. Greenleaf, "are allowed from the necessity of the case, partly

for the protection of the wife in her life and liberty, and partly for the sake of public justice." Green. Ev. 391.

I think therefore from the necessity of the case, the wife is a competent witness. Numerous cases might arise where it would be impossible to prove the marriage in any other way. Suppose a husband and wife with a number of children, should arrive in this city from Scotland where they have no marriage act, and immediately after their landing the husband should desert his wife and children, leaving them a charge upon the public, he possessing ample means for their support, is it to be endured that she should not be admitted to prove that they were lawfully married in that country, and that he was the father of the children? I think not. For it is said the necessity which demands this exception for the wife's security, does not mean a general necessity, as where no other witness can be had, but a particular necessity, as where for instance the wife would be exposed, without remedy, to personal injury. *Bently v. Cooke*, 3 Dougl. 422; *Greenl.* 391. Hence it was ruled in *Perry's case*, "that a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her till the marriage: of which fact she is a competent witness, and this by the weight of authorities, notwithstanding her subsequent assent and voluntary cohabitation." *Greenl.* 391; 1 *Phil. E.* 159. And in the case of *Rex v. Wakefield*, 2 *Russ.* 706, for a like offence, the court held the wife to be a competent witness on the ground of necessity, even supposing the marriage was valid, and also on the ground that the defendant could not take advantage of his own wrong. In the case of *Republica v. Hevice*, 2 *Yates* 114, it was ruled on the trial of an indictment against the husband and others for a conspiracy in enticing her away from her parent and procuring the marriage, the wife was a competent witness.

There is another principle on which I think the competency of the wife is more clear. The exclusion of husband and wife from being witness for or against each other, is founded partly on the identity of their legal rights and interests, and partly on principles of public policy; that is, essential to the happiness of social life that the mutual confidence subsisting between husband and wife should be sacredly protected and cherished to an unlimited extent; therefore to permit or compel a violation of

that confidence, would be calculated to destroy the social happiness of the married state.

But in a proceeding like the present, none of those reasons exist. The wife is not a party, and the guardians of the poor can carry on a prosecution for desertion, without the consent of the wife, and even against her will. *Overseers of Poor v. Smith*, 2 S. & R. 365. When thus called, the wife does not violate any of the sacred obligations of married life. Her testimony is not to impose any new obligation, for he is bound to support his wife at all events, whether he lives and cohabits with her or deserts her, leaving the expense on others. She has no direct interest in the matter, for she must receive her support from the guardians, whether the marriage is established or not.

There are many analogous cases which sustain the opinion above advanced. A strong case is that of *Rex v. Bathwick*, 2 Barn. & Ald. 689, and *Phil. Ev.* 155, which was a case that arose upon a parochial settlement. And the doctrine in relation to exception to the general rule that husband and wife are not witnesses, was fully examined by lord Tenterdon, and held, that the testimony of a woman could be received, although it tended to charge the alleged husband with bigamy; but as that was not the direct question in issue, she was admitted as a witness. The case of *King v. Brumly*, 6 T. R. 330, in principle sustains the view the court have taken. On this point, see also *Bull. N. P.* 287; 1 *Phil. Ev.* 160; 2 *Stra.* 363. And the American cases are equally clear—2 *Pick.* 308; 3 *Pick.* 296; *Ald. Reps.* 381. Without citing farther authorities to sustain this position, I will consider the testimony of Savilla Nathans in connexion with a few facts, proved by her relatives and some other witness, before she was examined, and to which her attention was not particularly directed.

It appears from the evidence that the father of Savilla came from England to this city about eight years ago, with two children, a son and this daughter. He was in moderate circumstances. She says she was twenty-two years of age last January. The defendant was a broker, and at the time of his first acquaintance with this female, had his office for business not far from the house of her father, with whom she resided. She became acquainted with him in 1839, and during that year he commenced addressing her as a suitor. It appears from her testi-

mony, that her father opposed the addresses of Mr. Nathans, hence their meetings were generally clandestine; and after his attentions for some months, a quarrel ensued, in consequence of his allegation that he had heard reports which he considered derogatory to her character; and shortly after that he sought a renewal of those attentions, upon the ground that while lying sick at home he heard a conversation among some of the members of his family, in which it was stated those reports had been made for the purpose of dissuading him from a farther continuance of his addresses to her. After this explanation made to her, an entire reconciliation took place between them, and he continued his devotion to her for a period of fifteen or eighteen months, during which a solemn promise of marriage was made to her, which she accepted. During the period that he was addressing her, she states that she was often at the house of the defendant's brother, and with his wife. That brother has been called as a witness by the defendant, and he states his wife was in bad health, and during the period of her illness, Savilla, at his request frequently spent days with his wife, for the purpose of attending her, and as it would seem, administering to the comfort of one enfeebled by disease. It is perhaps proper to remark here, that there has not been the least aspersion of the character of Savilla, nor has her reputation for virtue or chastity, been in the least impeached, unless it is to be inferred from her connexion with the defendant. Whatever stain is fixed upon the brightest jewel which adorns a female, has been imprinted by the defendant himself. It is hardly suspected that she ever gave a listening ear to the flattering voice of any other man.

She states that in the spring of 1841, in the month of March or April, Nathans proposed to her that she should go to the shop of a goldsmith and have her finger measured for a ring. Mr. Charles Masson testifies that Mr. Nathans came with the lady to his shop in 1840 or '41, to have her finger measured for a ring, and from his manner and conversation he thought she was or was to be his wife: that he took the measure, and shortly after, Nathans brought him a diamond, which he set in the ring and delivered it to Nathans. She says, that after the ring was made, Nathans informed her of it, and fixed a time for presenting it to her. When they met, he told her he had the ring, and there was a secret about it. He said she disbelieved him so

much, that he wished to convince her that what he said was right. He then put the ring on her finger, and said she was to keep it a profound secret from every one, and what he was then going to say to her. He then told her she was to consider him her lawful husband, and he would consider her his lawful wife. She was to keep it a profound secret, for he could not perform the ceremony openly till the death of his father; he farther told her she was to bear her own name, and keep all that a secret from every soul on earth, and to consider him her husband with all but the performance of the ceremony, which would be performed on the death of his father—and asked her if she believed him, to which she replied *yes*. She then took the ring, and *agreed* to all he had said, and says she has worn the ring ever since. It would seem the interview closed by his remarking, “that it was little man could do which would make them love each other more.” On the cross-examination to this point, she says: “When Mr. Nathans gave me the ring, he told me I was to consider him my lawful husband, and I was to be his lawful wife. It was to be kept a secret.” (In another part of the examination she says she assented to it.) In the continuation of her answers she says: “I first told my mother of this, after the breaking up in Wallace street. I always expected him to perform the ceremony after his father’s death.” She then says, on this cross-examination, that the first sexual intercourse they had was about the time he gave her the ring—she thinks after he gave her the ring—and the first child was born on the 3d of December, 1841.

It appears from the testimony of Savilla in connexion with that of her mother, that after her pregnancy was discovered, Nathans had an interview with the mother and Savilla, in which he acknowledged himself the father of the child with which she was then enciente, and told the mother his conduct had been wrong, but said all would yet be made right, and then proposed that Savilla should be removed from the house of her father during the period of her confinement. The mother testifies that she for a while was afraid to disclose the situation of her daughter to the father, fearing his anger and personal violence both to Nathans and her daughter. But as the ultimate termination of her condition approached, it became necessary that the father should know it, and it would seem

that Mr. Nathans and the father had an interview, but what passed between them is to us unknown, as the voice of the father is silenced by death. But the mother and daughter disclose the circumstances of her confinement. At the instance of Mr. Nathans she was removed to a secluded part of the city. A nurse was engaged to take charge of the child. Nathans employed Dr. Stewart to attend her, and within thirty-six hours after the birth of the child, the mother took the infant at the request of Nathans to a nurse by the name of Elizabeth Pratt, who has taken charge of the child down to the period of the commencement of these proceedings. He directed that his daughter should bear the name of Mary Pinckton. It appears from receipts produced by the defendant, copies of which have been handed to the court by the defendant's counsel, that the defendant paid for the nursing of the child from the early part of December, 1841, to the 15th January, 1842, twenty-four dollars, and from that period to the 15th January, 1843, the sum of thirteen dollars per month, and after that down to the time of his desertion of Savilla, nine dollars per month.

After the birth of the child she testifies that he presented her with a gold watch, also for the child a silver cup, a gold chain, and a number of costly articles not unfrequently given by wealthy fathers to infant children.

She says that during their courtship he presented her with his miniature, which has been exhibited before the court, which is set in a gold frame or case which seems designed to be worn by a lady, and seems to bear a striking resemblance to the defendant. Numerous witnesses concur in saying that Mr. Nathans was constant in his visits to her at the house of her father from 1840 and '41, and to the time of the death of Mr. Hutchinson, which happened in September, 1843. A number of other witnesses testify that the defendant attended the funeral of her father, and that he was devoted in his kindness to her on that occasion, being with her when she cast a last farewell look at the remains of a departed father, escorting her to the carriage, riding with the mourners, walking with her and the other relations to the grave, and it would seem mingling his tears with hers, during the performance of the last sad office to the deceased; then returning with her to the house rendered lonely by the death of one of its inhabitants, and that one the head of the family. So

marked were his attentions and sympathies, as to elicit observations from the neighbours who attended the funeral, and in the language of one of the witnesses, "he appeared like one of the family."

On the 7th of December, 1843, three months after that event, the father of the defendant died. About six o'clock in the evening of that day, he called at the residence of Savilla and her mother, and told her that he had just learned that his father was dead, and embraced her in the most affectionate manner, saying, "you know the customs of our persuasion, I shall not see you for seven days." (He is a Jew.) He expressed the greatest concern and kindness for her, then departed.

As soon as the days of mourning particularly observed by the denomination to which he belongs had passed, he returned to her mother's, when he told Savilla she had long lived a life of wretchedness for him, but soon every thing would be fulfilled according to his promises; spoke of taking a house and having the ceremony performed, assured her that every thing should be fulfilled according to his promises, and rather than fly from them, "he would sooner have his head severed from his body." He then spoke of their going to housekeeping, told her to use a hundred dollars he had previously given to keep for the purpose of using it in the purchase of articles necessary to furnish a house, saying there was a great many things wanted which a man knew nothing about. He sent to her a set of china, a carpet, gave her money to purchase articles for making a bed, and many things for furnishing a house. Told her he was going to look for a house, and wished every thing fixed as soon as possible. Looked at several houses which he described to her, said he wished to go to housekeeping as soon as possible, and as soon as his days of mourning were passed, he would have the marriage ceremony performed by the Rev. Zelotes Fuller. She wished it performed before the house was taken; his reply was, he hoped she did not disbelieve him on that subject, but he purposed having the house taken and furnished before the days of mourning were over. She says her mother was made acquainted with all this. In the latter part of December, a house in Wallace street in a highly respectable neighbourhood was selected. At the request of Mr. Nathans she went and rented the house, he alleging that he could not go out while

"his beard was on." She says she believes the house was rented in her name (although Nathans paid the rent), and she assigns as a reason why she used her maiden name, was because she did not suppose she could use his name till the marriage ceremony was performed, nor did she know that a marriage could legally exist for that purpose till after a public ceremony of that kind. Nor did Nathans give directions in whose name it should be rented. About the first of January, at his instance, she and her mother removed to the house with the little furniture the mother had, which was put in the back part of the house, and Nathans furnished the front part,—the parlours and chamber. It is clearly proven by the testimony that he furnished the house in a neat and comfortable manner, and in a style corresponding with that of young people just commencing housekeeping, who were in moderate circumstances in life. During the time they were arranging the furniture, painting the house, &c., Savilla and her mother resided in the house alone. After it was completely arranged, Nathans came there to reside. He had told her he did not intend to occupy the house till the ceremony was performed, although he considered her his lawful wife; still he wanted it performed and by Zelotes Fuller, for he would give a marriage certificate which would be retrospective as well as prospective in its effect. At first, she says he lodged in the front chamber by himself, and she slept with her mother. He proposed cohabitation, and she objected until the marriage ceremony was performed. She then says, "He called me aside, took me by the hand, and said, I had long been his lawful wife; he kissed me, said, I had long been his lawful wife, and I had long considered him my husband, and I should occupy the chamber with him." He said Fuller would soon come from New York, and he would have the ceremony performed. From this time their cohabitation began at their residence in Wallace street. The mother says when this cohabitation began, Nathans told her they were married. She says her mother supposed they were married. That after the defendant took up his residence in the house, she went by his name at his request. Nathans paid the expenses of the house, gave her five dollars a week for market money, and bore the entire expense of the household, acted as its master, took his boarding at the house and treated Savilla as his wife, calling Mrs. Hutchinson mother, invited respectable ladies

to visit Savilla, and in their presence called her Mrs. Nathans, and recognised her as his wife. She swears positively that she did not intend to live with him in a dishonourable way, nor did she consider that she was living in a manner that was dishonourable. She says from the time he gave her the ring she always considered him her husband, and always should, although she supposed a public ceremony was necessary to make the marriage legal.

Thus they continued to live until about the middle of March, 1844, when he began to treat her with neglect; ultimately there was a quarrel, and on some occasions he abused her in a most unfeeling, cruel, and barbarous manner. During one of these scenes he proposed a separation, said he wanted her to forsake him, that *she should bear his name*, he would provide for her support, and she should assign as a reason for her conduct his dissipation, and if that would not do, then to report that she left him *on account of his religion*. To all this she refused her assent. He then solicited her to apply for a divorce. This she also refused to do. He then wished her to go with him to the office of his counsel, Mr. Phillips, to sign some paper (connected it would seem with the subject of separation); this she declined. He then told her that he would leave her, and she might take care of herself. After this he made a farther proposition, that she should leave her mother and take a room in a retired part of the city, and he would support her; this proposition she seems to have rejected with disdain. During one of these interviews he brought Dr. Stewart to the house, who stated Nathans had informed him that she had made remarks which he thought were calculated to injure him in his reputation, all of which the doctor says she utterly denied, and which she says were never made by her. About this time Nathans deserted her, and refused to provide for the support of the child that was born. He however paid the physician's bill and the lying-in expenses of Savilla, when delivered of a child the following July; with that exception he has contributed nothing towards her support or that of the children, and they now have become a charge upon the public. There are also many other facts stated by her, which strongly tend to prove a contract of marriage in the present time between these parties. But I will not now pause to inquire whether this evidence proves a marriage actually con-

summated by them, or whether on this testimony the court would be justified in making an order against the defendant for the maintenance of these children; for I am inclined to defer any indication of opinion on this point, till it is considered with other matters worthy of observation.

The testimony adduced to support the second position assumed by the counsel for the guardians, we will now examine.

Charles Hutchinson, the brother of Savilla, testifies that a few days after the death of his father, at the instance of his mother he had an interview with Mr. Nathans in her presence and that of the daughter, when he asked Nathans what were his intentions relative to his sister, and whether it was his intention to marry her. Nathans inquired whether he wished them to be married then, to which the brother replied yes, rather than do worse; Nathans observed that the house the mother and daughter then occupied was not a fit place for them, and desired they should remove; to this the brother objected, unless a marriage was solemnized between them. Mr. Nathans said he did intend to marry her within three months. The brother then asked why they could not be married then, to which one of them replied they could not till the decease of Mr. Nathans' father. The defendant during this interview often urged that the mother and daughter should move to another house, to which Charles objected, alleging his willingness to support his mother, and stated what he would do for her. Mr. Nathans said he would pay the one-half of the mother's board, but the brother refused the offer, saying there was no claim on Mr. Nathans, to which he replied "that he felt that he had the same right to contribute to the support of the mother that the son had." In about two weeks after this the mother and daughter removed to Callowhill street, and from thence to Wallace street the latter part of December, 1843.

The mother, Mary Hutchinson, says, that during their residence in Callowhill street, Nathans brought many articles of his dress to Savilla to be repaired, and she made him shirts and other light garments requiring work, which were attended to by her. She says Nathans and her daughter told her they had taken a house in Wallace street, and wished her to go with them, that he furnished the house except the little furniture she took, which was put in the kitchen and her room. She says after

they went to Wallace street and he came there, *Nathans called her mother*. He told her they were married. "He said to her what a minister could do was but a bargain, and they were married in the sight of God." Her daughter told her they were married, but no one but them knew when, as he did not wish it published. She said they had long been married. She says Nathans paid the expenses of the family. About the time he deserted Savilla, the mother says he had an interview with her, in which he desired that Savilla should demand *a divorce*, and said she was to go by the name of *Nathans* as she had done, and he would get money to satisfy her. He spoke of buying a house in the spring to which they were to remove, and said he would have the little daughter home. This was before these difficulties began, as it would seem from the evidence.

The mother also testifies that when he had the interview with her, when it was discovered Savilla was pregnant with the first child, Nathans told her all would be right, that he *would make her his lawful wife* on the death of his father, that he would take care of Savilla, and wished the matter kept *a secret*; that he would not have her disgraced for the world, and requested the mother to take the money to the nurse, and assigned as a reason why he wished the marriage put off till the death of his father was, that he feared that his father might leave the portion of the defendant to his daughter, and begged of the mother to keep the whole affair a secret.

Mrs. Elizabeth Knight, a highly respectable quaker lady, says the key belonging to the house rented by Nathans in Wallace street was kept by her; that he first came for it, and looked at the house; in a day or two Savilla came with him, and soon she came alone, had a servant employed, the house cleaned, and shortly they removed into it. She says it was very neatly furnished, and describes the furniture. She often saw them, and Savilla spoke of Mr. Nathans as her husband. Mrs. [Knight called on them, and shortly after their removal to the house, Savilla was taken sick. This lady visited Mrs. Nathans in her sick chamber, where she says she appeared surrounded with every comfort. In a few days she called again, and still found Savilla in her chamber, where she met Mr. Nathans. She tells us that his deportment was polite, that of a gentleman and a husband. She spoke to him of the illness of *his wife* with

regret, and his reply was appropriate, evidencing that he was her husband. He appeared pleased with the attentions and visit of Mrs. Knight to his wife. She subsequently again visited them, when they were at their meal, Mr. Nathans, his wife, and mother, at the table. Savilla was at the head of the table, and his deportment like that of a gentleman with his family; he invited Mrs. Knight to dine with them, called Mrs. Hutchinson mother, and she says Mr. Nathans always addressed her by the same name, that of *mother*. On another occasion she went in and found them at breakfast, and was about to withdraw, and Mr. Nathans invited her in. She says she has on more occasions than one heard him call Savilla Mrs. Nathans, and always spoke to her and of her as his wife; and farther testifies that they lived there as husband and wife, till the disturbance took place which produced the separation. In one conversation with Mrs. Knight, Mr. Nathans spoke of the *cause* of Savilla's indisposition, and in reference to the period of the return of the wife of Charles Hutchinson from Europe, when he addressed Savilla saying, "*by that time we shall have a little niece for her.*"

Emma Erringer, a young lady about eighteen years of age, who it seems was the friend of Savilla, and the daughter of a respectable grocer in the city, testifies that she often visited these parties in Wallace street. On her first visit she was introduced to Mr. Nathans. Her second visit was on Sunday about tea time. He asked her to stay to tea, saying that if she did he would accompany her home, but the invitation was declined; as she went out Mr. Nathans invited her to call again. Her visits were frequent, and she saw him giving directions about the furnishing of the house, how the carpets should be put down, the putting up of the blinds, and superintending it generally. He called Savilla Mrs. Nathans. She was invited to take tea with them on the third visit, and she accepted the invitation. He showed her articles of linen, spoke of its being made, said it was done by *his dear Savilla*, and of their happiness; asked Miss Erringer if she did not think he was greatly blessed? to which she replied in the affirmative. *He spoke to her of marriage; told her she should get married, for it was the happiest life that ever was led.* She then asked him how long they had been married? "he said for a long time." (Miss Erringer says she was not then aware that Savilla had ever had

a child.) She staid till about ten o'clock that night, and Mr. Nathans attended her home to her father's.

On another occasion she was there, when Mr. Nathans invited her to come and spend a couple of weeks with *his wife*, as her mother was to be absent. She says, he often spoke of the happiness of his condition: when she staid in the evening, he attended her home. She visited them during the sickness of Savilla, when he spoke of losing her and exclaimed, "O my God, what a wretch I should be." As Savilla became convalescent, he spoke of taking her to ride on the recommendation of Mrs. Cook, and invited Miss Erringer to ride with them. This witness speaks particularly in these interviews, of his *calling her Mrs. Nathans*, and various incidents which clearly show that he called her his wife and treated her as such.

Mrs. Anna Erringer, the mother of that young lady, often visited the house of Mr. Nathans in Wallace street—was there when Mrs. Nathans was sick—saw him put money in the bureau drawer as he was going out, saying to Savilla, "My dear, here is money for this week;" she heard him call her *Mrs. Nathans*. He got refreshments for Mrs. Erringer and her daughter, while his wife was sick: he acted as the master of the house—requested that her daughter should come and visit them the following Sunday—and in all respects treated Savilla as his wife, and conducted himself towards her as a husband, until about the time of his desertion. Sincerely believing they were lawfully married, Mrs. Erringer suffered her daughter to visit them when she pleased.

Philip Erringer, the father, was also examined as a witness, who testifies that he visited Mr. Nathans at his house in Wallace street, a number of times. He took tea there on one occasion. He was there during the sickness of Mrs. Nathans. Mr. Nathans said he would take her out to ride—asked Mr. E. to permit his daughter to accompany them—spoke of her as *his wife* and lady. Mr. Erringer spoke to Nathans of his pretty wife, and of his happy condition, with which he appeared much pleased, and responded to the flattering compliments paid his wife. It is manifest from the testimony of this gentleman, that Nathans treated her as his wife, and conducted towards her as an attentive husband down to the time of the desertion.

Mary Worrel, who was a servant girl in the family of Mrs.

Knight, was often in at the house of Mr. Nathans, and during the sickness of Mrs. Nathans attended her, and was paid for her services by Nathans himself. She says he called Savilla, Mrs. Nathans, when he directed the witness do anything for her. She testifies that the defendant was the master of the house—directed the witness to carry dinner to *Mrs. Nathans*. On one occasion the defendant asked her who she would prefer living with—Mrs. Knight or *Mrs. Nathans*—and witness replied, the latter. She says, during this sickness Mr. Nathans was in the chamber with his wife, and *in the bed*, and it would seem in all respects treated her as his wife.

Mrs. Charlotte Burnet says, she was at their house in Wallace street—staid to tea at the invitation of Mr. & Mrs. Nathans. Mrs. Nathans told her they were married.

Mrs. Eliza Cook heard Mrs. Nathans was sick, and called to see if she could be of any assistance—saw Mr. Nathans there—she saw her in her sick chamber—she was treated with politeness and attention by him—she was invited to call and see them again.

Q. C. Brown says, he knew the defendant and Savilla. Nathans spoke to him as if he was married to her. They came to visit at his house, his wife being an old acquaintance of Mrs. Nathans. Defendant invited the witness and his wife to visit at his house. When joked by witness about being married, he said his "courting days were over." When shown a miniature of the wife of the witness, Nathans said he wished to get his *lady's taken*, and inquired where the artist lived.

Witness says he thought they were married from his conduct towards her, and never heard till he was called as a witness, that they were not.

Dr. Burn a dentist, was also examined, who testifies that Mr. Nathans employed him to fix Savilla's teeth—that he appeared to take a deep interest in their preservation. This appears to have taken place before they went to Wallace street. Mrs. Jeffries and a number of other witnesses, testify as to the attentions of Mr. Nathans to Savilla at the funeral of her father, and his constant addresses to her for a long time before.

The question now recurs, does this testimony (excluding from the mind all consideration of the facts sworn to by Savilla), furnish satisfactory evidence of a marriage between these parties?

I think, from an examination of the authorities, it is clearly settled that cohabitation and reputation prove a marriage, in reference to the rights of third persons, and is often conclusive when the marital rights of the parties affected, are litigated. It seems to be decided in numerous cases, that where a man takes a woman to his house, and by mutual consent they live together as husband and wife, hold themselves out to friends and acquaintance as such, and by their conversation and conduct represent to the world that they are married, courts in their administration of the law, will presume the marriage contract made and executed. This is warranted by the law, upon the principle that all other contracts are proved, viz. that a contract may be established from the acts and declarations of the parties, as clearly as by the testimony of witnesses present at its formation. If the evidence is sufficiently clear to convince the mind, by those acts of the parties, that a marriage contract once existed, it is not in their power to repudiate it, and make their issue illegitimate.

Hence it is said by the chief justice, in *Linser v. Bower*, 1 Penn. R. 450, "For civil purposes, reputation and cohabitation are sufficient evidence of marriage."

In *Taney v. Hallacker*, 8 S. & R. 166, it was held that marriage might be proved by the confession of the parties. So in *Chambers v. Dickson*, 2 S. & R. 476, in an action for dower (which in its character has a strong similarity to the present), it was held that cohabitation and reputation are evidence of marriage, and may be conclusive of the fact, and fully warrant a jury in rendering a verdict in favour of one claiming on that kind of testimony alone. 9 Paige R. 611.

In a prosecution for bigamy, it was ruled by this court that the confessions of the defendant, of his first marriage, were evidence of the fact. 1 Ashmead 272, *Com. v. Murtagh*.

From these authorities it is manifest, that wherever the marital rights of either party are affected, and the marriage is sought to be established, it may be done on the confessions of the parties; cohabitation, which is only the act of the parties, is a circumstance from which the contract of marriage may be inferred; reputation, which is only another fact showing the mutual consent of the individuals themselves to the contract. And there are numerous other cases in which these facts are held binding upon the parties, where the rights of third persons are affected,

and the legitimacy of the issue produced by such connexion, is called in question; and the presumption is always in favour of legitimacy, and of the innocence of the reputed parents. 3 Starkie 1248; 1 Phil. 462-3. And this writer observes: "The *fact* of marriage is generally considered as *sufficiently proved*, by presumptive evidence of cohabitation, or even by general reputation." So in *Conningham v. Conningham*, 2 Dow. 483, it was held that in cases of cohabitation, the presumption is in favour of its legality. In the case of *Car v. King*, 12 Mod. 372, it was held, in action of debt against an alleged husband for the boarding of his wife, it was in proof that he had cohabited with her and owned her as wife, that it was sufficient to charge him.

And what more is asked in the case now before us? The guardians of the poor simply seek to charge the defendant with the expenses paid and hereafter to be paid, for the board of the woman whom it is proved he called his wife, owned her as such, cohabited with her as a wife, and that of the infant children, the result of such cohabitation.

In *Longfort v. Tyler*, 1 Salk. 112, it was held the husband was liable on the wife's contract, because they cohabited. In the case of *Bolten v. Prentice*, 2 Salk. 1214, it was held, cohabitation was sufficient to charge the husband for necessaries furnished the wife. *Reed v. Pass*, 1 Esp. 213. The same rule of law is held in most of our sister states. Hence we find it ruled in *Fenton v. Reed*, 4 John. 52, that an actual marriage may be inferred in ordinary cases from cohabitation and acknowledgment of the parties. *Jackson v. Claw*, 18 John. 348. In the case of *Newburyport v. Boothbay*, 9 Mass. 415, a marriage was inferred from cohabitation and general repute, for the purpose of fixing the settlement of a pauper. I shall conclude citations on this point, by referring to *Doe v. Jesson*, 6 East 80, 24; 2 Camp N. P. 113; 10 East 216; and the case of *The King v. Twynning*, 2 Barn. & Ald. Rep. 385, where it was held by Bayley j., "that the law always presumes against the commission of a crime, and this presumption might be invoked in favour of a marriage."

With this strong array of authorities, what should be the rule of law which controls the court on the facts before us? clearly that a marriage is proved between the parties by their own acknowledgment, coupled with the fact of cohabitation for at least a period of about two months—not, it is true, a marriage

solemnized by one performing the duties of a sacred office, or by a magistrate, but by a contract in the present time—by their mutual consent and agreement, that they would then be married, a solemn contract having for its consideration their reciprocal promises that they then agreed to be man and wife—and in the language of the ancient writers, a contract *per verba de præsenti*, such a contract as is held by our courts to be valid and binding upon the parties, and of the same validity as if celebrated in the most sacred manner in the church, before an assembled congregation, by an officiating priest. Such in my opinion is the case proved before us, without considering the testimony of Savilla Nathans.

Will any lawyer doubt, that if a grocer had furnished this family in Wallace street with necessaries for their use; a butcher had delivered them meat; a flour dealer furnished flour; a merchant clothing, and charged the articles to this defendant, and we were now trying the question of his indebtedness, that this court would be bound to instruct a jury, that if they believed the testimony of these witnesses to whose relation of facts I have referred, they would be justified in finding for such plaintiffs?—that from those declarations of the parties, their cohabitation, and the reputation so proved, they might presume a marriage contract? The guardians of the poor ask no more now. They request that we shall order him to provide for that woman which he acknowledged as his wife, and she confessed him as her husband, and the issue of that often asserted marriage; and it seems to me I should disregard the settled law of the land if I was to refuse such a decree.

It must be borne in mind that when such a contract is once made by the parties, it cannot be dissolved by their own consent. It is only by the solemn adjudication of the legally constituted tribunals or the law making power, or the act of God, that such a contract can be disannulled. It cannot be destroyed by the acts of those who made it. It is against the policy of the law that such should be the case.

All good governments for the protection of the human race, and for the proper organization of civil society, have prohibited those who once enter into a marriage contract from retracting by mutual consent. 1 Black. 470, 472.

If this is the law (of which there can be no doubt), then one

ground of the defence must utterly fail if the marriage contract is sufficiently proved by the acknowledgments of the parties, their cohabitation and general reputation.

It is first proved by the defendant that after his desertion, Savilla charged him before an alderman with being the father of these children, and that they were bastards. A certified copy of the magistrate's return has been given in evidence, and it seems from that she declared on oath that he was the father of the child with which she was then pregnant, and the reputed father of the child that was born, but she does not swear that they were illegitimate. But it is contended that it was owing to the informal manner in which the magistrate made up the record, although the charge of fornication and bastardy is not specifically alleged. Be it so. And probably it does not alter the state of the case, and I am disposed to consider it in that light. She also charged him with seduction under the act of assembly of 1843, which makes that offence punishable criminally in this state.

But can these subsequent acts of hers avoid a marriage contract previously entered into? I think not. It has also been shown that an action for a breach of promise of marriage was brought by her, through a next friend in the district court, and in order to hold the defendant to bail she swore that she was a single woman. Still I do not think this could invalidate a marriage which had once been made. I think it has been clearly shown by authority that a marriage *per verba de præsenti*, is as binding in law as one celebrated by the observance of the most solemn ceremonies usually observed on such occasions, and that from acknowledgment, cohabitation, and reputation, such a contract is presumed. I imagine it will hardly be contended, if the guardians of the poor had produced the marriage certificate of a clergyman showing that these parties were married in the spring of 1841, sustained by the oath of a witness who was present when the ceremony was performed, and after the desertion of the defendant, Savilla had instituted all these proceedings, that the court on that ground should pronounce the marriage void. If the proof by the facts now disclosed is as conclusive that the contract was made, we must be governed by the same principle.

But supposing she entertained the opinion, that for the want

of a formal ceremony there was no marriage (which is the fair inference to be derived from her subsequent acts), is her mistaken apprehension of the law to alter the relation of the parties created by such a contract? Surely not. And it appears to me the case of *Steadman v. Powell*, 1 Addams' Rep. 58, is conclusive on this point. Where a marriage in Ireland was inferred from circumstances of avowal and reputation, the ecclesiastical court held that it was not invalidated by evidence of belief on the part of the husband, that it was invalid, having been celebrated by a popish priest.

It is also shown that Savilla prosecuted the defendant for a breach of the peace, and for the indecent exposure of his person (in this last the mother also joined in making the oath). Both of these prosecutions were entirely consistent with the contract of marriage. For a wife may prosecute her husband for a breach of the peace, and the court will hold him to bail. 4 Green. Ev. 392. It is also shown that she prosecuted the defendant, with one Ann Blee, for a *conspiracy* to procure her seduction. The offence consisted in the conspiring, and she might make the complaint, and if the commission of the crime affected her person and was injurious to it, she could make the oath. Nor could any such act as has been already shown, destroy the marriage contract, if it had been once executed.

Another ground of defence taken is, that a number of witnesses have been examined, who testify that they never heard that these parties were married. But it must be borne in mind, but two of these witnesses visited these parties at their residence in Wallace street. One of these was Dr. George Stewart, who says that he attended Savilla at that house on the request of Mr. Nathans. This witness states she was pregnant, and threatened with a miscarriage, and he was called upon to attend her to prevent it. If Nathans did not consider her as his wife, a kindness like this on his part is rather unusual, if the intercourse of the parties had been illicit. After this, Dr. Stewart attended her when she was confined with the second child, at the request of the defendant; and this attention was given after the desertion. After the desertion, when Dr. Stewart attended Savilla, he says that he did not attend her as a married woman, for then Nathans told him they were not married. This was after the desertion, and no subse-

quent declaration of the defendant could change the relation of the parties, any more than her affidavits before the alderman already noticed. The other witness was Alfred Newkirk, a clerk to the defendant; while at the house he heard them say nothing about the marriage. He staid there to tea, and partook of the hospitalities of the parties, and he informs us that Savilla sat at the head of the table and Nathans at the foot. When he was invited to take tea with them, he says the invitation was given by Savilla, and Nathans responded to the invitation, saying "that it would give him pleasure for the witness to stay." Now if the defendant was not the master of the house and the pretended husband of the lady, it is rather singular he should have been thus attentive even to his own clerk on the occasion.

All the other witnesses produced by the defendant, whose attention has been called to the subject of marriage, only give negative testimony, saying they never heard that they were married. But it is manifest those persons never saw the parties together in Wallace street, had no opportunity of seeing any manifestations of conjugal affection or of witnessing those acts, or hearing the declarations of the parties, which would tend to disclose the real relationship which existed between them. Upon the general rules for estimating evidence, this cannot weigh a feather, against the repeated and numerous declarations of both the parties that they were married. Their residence as man and wife in a respectable neighbourhood, their entertaining friends under this avowed relationship, their proclaiming to the world by their acts and declarations, combined with those nice and delicate attentions which make a deeper impression upon the mind than the most open protestations, can never be rebutted by scores of witnesses, who merely say they never saw those acts or heard that they were married. It is this positive evidence which we conceive it is incumbent upon us to credit. It is from those who had the means and opportunity of knowing, that we must seek information.

In considering the case thus far, I have left entirely out of view the testimony of Savilla Nathans; and after the most anxious investigation of this laborious case, when twelve days had been spent in its hearing, I am fully convinced that a marriage is proved, a contract valid in law, without listening to a word contained in what fell from her lips; and if her testimony

was discarded, I should feel bound to make a decree against the defendant. Shall we however discard all she has said, and pay no attention to it? That she is competent as a witness, I believe is clear from the authorities cited.

Is she then entitled to credit? Is it safe for the court to regard any thing she has said? When examined as to the various affidavits made before the magistrates, she says she knew very little that was contained in them; that her brother employed the counsel on whose advice these proceedings were instituted, and she had no interview with the learned gentleman who first conducted those proceedings, nor did she before that ever tell her brother of the connexion that had been formed between Mr. Nathans and herself. That his cruel desertion, his strange conduct towards her, almost cast her mind from its balance, and she recollects very little which transpired relative to those proceedings. But when the court arrived to which the defendant was bound to appear, and she was called upon by the intelligent gentleman who then conducted the prosecutions under the attorney-general, to go before the grand jury, and the nature of the bill of indictment was explained to her, she exclaimed at once that she would *never swear that* these *children* were illegitimate! She declared that Mr. Nathans was her husband, and in the sight of Heaven they were married, and whatever might be the consequences she could never declare otherwise! When asked the cause of all this, she told her story such as appears in her testimony; and the guardians of the poor, under the directions of their eminent solicitor, have brought the case before us in its present form. She has also testified that it was her belief that no marriage was binding upon the defendant *in law*, unless it was performed in the presence of a clergyman, nor did she suppose she could assert her marital rights till her case was disclosed to the counsel for the commonwealth, and subsequently informed to the same effect by the advice of a friend, who mentioned the case of *Tomlinson v. Tomlinson* in this court, where a marriage was held to be valid although no such ceremony was performed.

To a female born in England, where all marriages which are not celebrated in pursuance of the statute of 26 George II. are void, this is not a strange mistake. Nor do I believe that nine hundred persons out of one thousand in this state are aware, that a mar-

riage is legal unless performed in accordance with the ceremonies which usually attend the ratification of such contracts. Yet we all know, who are well acquainted with legal science, that this can be proved in the manner in which other contracts are. Nor can her ignorance of the law excuse her or the defendant, from the binding force of such a contract, if it was actually made.

Suppose that Samuel Nathans, instead of deserting her, had died the 1st of March, 1844, after his residence in Wallace street, leaving a valuable real estate, and these children by their guardian had brought an action of ejectment to recover the land, and Mrs. Nathans had been examined and all the other evidence on our notes had been laid before a jury, and the court had laid down to them the principles of law above stated, and the jury had found a verdict in favour of these heirs, would any court in Pennsylvania set aside such a verdict because it was against the law, or not warranted from the evidence? I think not. I feel confident, if setting at *nisi prius* on the trial of such a cause, I would not on such evidence as this, finding in favour of the legitimacy of the children, dissent to the verdict. When a court decide both law and fact, I conceive this is the true rule for their guide, and an admirable standard for testing the correctness of their conclusions upon the facts presented. I certainly should be satisfied with such a verdict.

It is said by the counsel for the defendant there is much to discredit her. Her subsequent affidavits made in these prosecutions weaken her testimony. It may diminish its weight, and does unquestionably render it more doubtful, but in my opinion does not destroy it. I believe much of it. I have no doubt the contract of marriage was made when the ring was presented, and all the subsequent conduct of the parties down to the day of the desertion go to confirm that impression.

It is contended that all these acts of the parties was only a love affair; in fact that they were acts of open lewdness, and not those of marriage. I cannot believe such was the case. And if the intentions of the *defendant were criminal*, it is one of the boldest acts of licentiousness found in this, or in the tales of romance descriptive of adventures in any other country. There is a marked distinction between the criminal indulgence of unrestrained passion, and the hallowed rights and decencies of marriage deportment in life. The lines of demarkation are

strong, visible to all, and firmly established by public opinion, and also recognised by the rules of law in accordance with the morals of society and for the benefit of mankind. It is clear from the declarations and conduct of these parties, that they started to travel in the peaceful walks of married life. After having once entered those quiet shades, they are not suffered to depart. There is much due to the good sense of mankind, and to the rights and feelings of others. The defendant took this female to a respectable neighbourhood, he represented her as his wife, he introduced her to his friends as Mrs. Nathans, he invited gentlemen and ladies of respectability to visit them, and put on the shining garments of a married man, and decked her as his youthful bride; the law itself and its policy forbids that these garments should be laid aside at pleasure. It would be a sad commentary upon the administration of our law, if female innocence and virtue was suffered to be held as a mere trifle.

While the libertine and debauchee does not invade those decencies and forms which sanctify the married state, he may revel in his criminal indulgence, looking only to the jail or penitentiary for his final doom; when he seeks to elevate himself to a more exalted sphere, and assume the garb of marriage for the purpose of accomplishing his nefarious attempts on female innocence, the law has wisely in its protection for society held all such bound by their acts and declarations, when it is manifest the innocent victim believed those avowals were sincere and made in good faith.

From a careful examination of the whole case, I believe that Samuel Nathans and his wife Savilla were lawfully married, and that Mary and Samuel, the infants mentioned on the record, are their children, and that the said Nathans has deserted them and they are now a charge to the guardians of the poor. Hence the court order and direct, that the said Samuel Nathans the defendant, pay to the said guardians for the support of the said Savilla Nathans and her two children, Mary and Samuel, the sum of *ten* dollars per week from the 12th day of December last, the time when these proceedings were began, and that he give bail in the sum of one thousand dollars for a faithful compliance with this order, or in default thereof that he be committed.

Counsel for guardians, *J. Murray Rush & James Hanna*—for defendant, *H. M. Phillips, O. F. Johnson, D. P. Brown, & G. M. Dallas.*

IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF LANCASTER.

[September 7, 1844.]

THE COLUMBIA BANK & BRIDGE COMPANY V. HENRY HALDEMAN.

1. The proviso in the act of the 11th April, 1825, repealing so much of the act entitled, "An act regulating suits on promissory notes and for taking stock in execution, as relates to promissory notes, drafts, or bills of exchange," is applicable to plaintiffs only, and does not extend to the fees of the several defendants' attorneys.
2. The prohibition of the taxation of attorneys' fees in several suits, being intended to prevent the multiplication of actions, is referable to plaintiff's attorneys, who alone are implicated in the mischief.
3. Defendants or their attorneys having no control in bringing the suits, are not to be deprived of their legal fees, because the plaintiff instituted several suits instead of a joint suit against all.

HAYES, president. This is a question of costs. The plaintiff on a joint and several bond of indemnity, executed by Henry Haldeman and five other obligors, brought six several suits—one against each obligor. That against Henry Haldeman was alone tried, and it resulted in a verdict and judgment for the defendant. The plaintiff then discontinued the other five suits, and paying into the office the defendants' costs in each, reserved exceptions to the attorney or counsel fee in all but the suit which had been tried, according to the first section of the "act to repeal so much of an act entitled 'an act regulating suits on promissory notes and for taking stock in execution,' as relates to suits on promissory notes, drafts or bills of exchange," passed the 11th day of April, one thousand eight hundred and twenty-five. The question was without argument submitted to the court. The general purpose of the enacting clause is to repeal a former act, which allowed the owner or holder of notes, drafts, or bills of exchange, where there were several drawers or indorsers, to bring suit against one or more of the parties thereto, at his option; but annexed to this clause is a *proviso*, that when the plaintiff on a promissory note, *bond*, bill of exchange, draft, or other instrument, brings more than one suit against all the parties bound or responsible, there shall not be any taxation of an attorney or counsel fee, except in one of the suits, to be elected by the plaintiff. This proviso is certainly not confined to the subject matter of the enactment, which does not embrace bonds,

but only promissory notes, drafts, or bills of exchange. It is, however, not the less effectual or valid on that account, for even when a proviso is opposed to the enacting clause, it shall nevertheless prevail. Thus, if a proviso be directly contrary to the purview of the statute, the proviso is good and not the purview, because it speaks the latter intention of the legislators. *Fitzgibbons 195, The Attorney-general v. The Governors of the Chelsea Water-works.*

To ascertain the meaning of the act of the 11th April, 1825, in relation to this matter of costs, let us consider the object of the proviso referred to. It was to restrain plaintiffs from multiplying suits on such instruments, when all the parties responsible for the payment of the money, might be included in one action. The device is, to prevent the taxation of any attorney or counsel fee, except in one suit, allowing the plaintiff to select the suit in which the fee should be taxed, probably on the supposition that attorneys would be induced by such curtailment, to bring no more suits than they would be compensated for by the legal fees. Now it is clear that defendants or their attorneys, are not within the mischief contemplated by the legislature. The suits, with respect to defendants, may always be regarded as *in invitos*. They cannot control the plaintiff's election, whether to sue a joint and several bond, &c., as a joint or a several contract. They have only to defend the suit, *in modo et forma*, as it is brought against them. If a plaintiff bring six suits against as many obligors in a bond, severally, when he might have brought one against the whole, it is not of course the fault of the several defendants; and, therefore, there is no reason why a compensation to which they are entitled in the way of costs, should be withheld. Costs are considered as a sort of penalty to the party upon whom they are imposed, and statutes giving them are, on this ground, construed strictly. It may as readily be seen, why in analogy to this characteristic, the costs of a plaintiff who brings ten suits when one would have sufficed, should be curtailed, as it is hard to perceive, why the defendants should be deprived of theirs. Or if the proviso be regarded as a restraint upon attorneys (which is probably its true aspect), we can conceive that the legislature might deem an attorney, who advises his client to bring *several* suits instead of *joint*, as properly compensated by one fee for all; but what possible rea-

son is there for denying to any of the respective attorneys who may appear for the several defendants, having no choice in the manner of bringing the suits, his just fee?

I am of opinion, that the defendant's attorney and counsel fee, is not within the spirit and reason of the proviso, and therefore not within its prohibition. The defendant's attorney-fee is accordingly to be taxed in each of the causes discontinued by the plaintiff.

IN THE COMMON PLEAS OF LEHIGH COUNTY.

[August Term, 1845.]

HOLLIS V. WELLS.

1. In an action brought to recover damages for the seduction of the plaintiff's daughter, it appeared that the defendant and the daughter slept together on the occasion of the seduction, according to a *custom* which prevailed in the part of the country where they resided (known as *bundling*), and with the knowledge of the plaintiff: Held, that the knowledge of the plaintiff amounted to connivance, and he could not therefore recover damages.

This was an action on the case to recover damages for debauching the plaintiff's daughter, by reason whereof he lost her services and incurred expenses in various ways.

The daughter S. H. was called as a witness, and testified that she was a single woman of the age of twenty-three years—that she had a child—that the defendant was the father of her child, which was about one year old—that she lived with her father when her child was begotten, and when it was born—that her mother was deceased and that she kept house for her father—that she had been at a battalion training, and that the defendant went home with her—that they took supper and very soon went to bed together—that the child was begotten that night—that he was there twice afterwards, and that he slept with her both times, *according to the custom of the country*—that her father knew of this custom in the family—that her father knew that the defendant was sleeping with her on the night of the battalion—that her father was not in the same room with them, but that he knew they were in bed together—that she thought he saw them in bed together. He was in the room where they were that night, but he might not have seen her in bed with the defendant.

D. H. a son of the plaintiff, was called as a witness, and testified that he saw the defendant at his father's house on the night of the battalion, and that he saw the defendant and his sister in bed together on that night. A number of other witnesses were called, and testified to the good character of the plaintiff and his family, and of this daughter except in this matter.

The defendant's counsel requested the court to charge the jury on the following points.

1st. That the plaintiff cannot recover in this case, because the defendant was in bed with his daughter with his knowledge and consent.

2d. That there can be no trespass, if the plaintiff connived at the criminal intercourse between the defendant and his daughter.

His honour, judge BANKS, charged the jury as follows:

This action is brought to recover damages for loss of services of the daughter. It is in all cases of the kind, necessary to prove that she at the time performed some acts of service for the father. Service however trifling, is sufficient to support this action. In this particular, this action is fully sustained. The relation of master and servant is but little more than fiction, made use of as necessary merely to support the action. The jurors are not confined, in their estimate of the damages, to those sustained by reason of this loss of service, and the expenses consequent upon the seduction. For this, but little compensation is given in most cases. It is seldom thought of in determining the amount. The jurors look to higher considerations, and reflect upon the dishonour and disgrace which is cast upon the plaintiff and his family by such an injury. The wounded feelings of the father, in the loss of comfort in his daughter—in whose virtue he feels no pride, and from whose society he can draw no consolation—are pressed upon the jury. That her example may corrupt the morals of his other children, will always have some weight. For their injury, and this distress and deep anguish, a compensation is awarded.

It is the highest duty of a parent to give proper instruction and education to his children, and to take care of their morals. The parent who neglects the culture of his children, and suffers them to grow up useless to others and shameful to himself, has

conferred but little benefit upon them or upon the community. He who thus neglects his own family, generally receives his reward in those griefs and degradations which are sure to follow its members, thus raised in ignorance, vice, and irreligion. It is in some degree optional with a parent, whether he will raise up his children to be ornaments or a disgrace to himself and family. The best instruction and the best example, are sometimes lost on children. This renders it no less the duty of every father to have a well regulated house. He should guard the morals of his children in his own house and under his own roof. If he does not do this, let the consequences fall upon himself. As the fault is then his own, his complaints are not deserving of much favour. This action is always founded on a wrong done by the defendant, and as regards the will and consent of the father, the daughter is supposed to be violated with force. It is this absence of consent on his part—this violation of his daughter's chastity against his will—that entitles him to sustain his action for a compensation in damages. When the criminal intercourse has been had with his knowledge and under his connivance, he would seek redress with but an ill grace indeed. He would not actually be a *particeps criminis*, but in want of decency and in breach of parental duty, he would approach very near to it. His indifference to his daughter's morals and chastity, would meet with but a just retribution in her misfortune and disgrace. The fault would be as much his own as hers or her seducers, and his assurance in coming to court to ask for a reward for the perpetration of a wrong which was known to him and which he might have prevented, would justify the belief that he had no objections to its commission.

Much has been said by the plaintiff's counsel about the custom in courtship which he has denominated "bundling." He has said that this custom prevails very generally in the part of the country where these parties reside. This may be so, but I am unwilling to believe it. If it is so, it is time the custom should be abolished. Even if this custom does prevail, it furnishes no excuse for the plaintiff's carelessness, or his daughter's indiscretion. If it be any excuse, it would extend equally to all concerned, and the defendant might claim his portion of protection under it also. The plaintiff has by this time, I apprehend, found out that this custom is dangerous at least, if he does not

feel that it is indecent. A man who takes no pains to abolish this custom in his own house, has no right to complain of consequences which most naturally follow.

The defendant's points have presented to us the plaintiff's conduct as a subject for us to charge on. The evidence as to his knowledge that the defendant and his daughter slept together, is undisputed. It is really a part of the plaintiff's own testimony. It appears to have been adduced by him as necessary to fix the paternity of the child upon the defendant, as if this alone were important and sufficient to make out the case. It did not appear to have occurred to him, that "*volenti non fit injuria*," was a sound legal maxim. The plaintiff's conduct was in the highest degree exceptionable. He did not object to the defendant and his daughter sleeping together, if he did not discourage it. He knew of it, and took no steps to prevent it. The connexion which has produced this action, may be traced to his own misconduct. The wrong is attributable in a very great degree to himself, and he ought not and cannot maintain this action for an injury arising out of a criminal intercourse at which he connived. *Verdict for defendant.*

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[June, 1843.]

KNOX V. THE SCHOONER NINETTA, JAMES BAYMORE, MASTER.

1. A libel for damage done to the cargo, may be filed even after the vessel has made one or two voyages subsequent to the injury being received.
2. Admiralty has jurisdiction to enforce such a claim against the vessel.

The libel in this case charged, that on or about the 1st of October, 1842, the libellant shipped on board the Ninetta, then in the river Rappahannock, 4360 bushels of wheat, to be carried for the freight stipulated in the bills of lading, and safely delivered at the port of Philadelphia. And that by reason of the improper and unjustifiable conduct of the master, the wheat was "wet, damaged and injured," so as to render it unmerchantable when it arrived at Philadelphia. And prayed process against the vessel, her master, owners, &c., for the damage.

The libel was not presented until after the vessel had made one or two voyages subsequent to the damage.

Captain Baymore, for himself and the owners of the vessel, interposed a plea to the jurisdiction of the court, for reasons stated in the opinion of the judge. This was argued by

*T. Dunlap Esq.*, for the libellant, and *G. M. Wharton Esq.*, for the respondent.

After which the following opinion was delivered by

RANDALL J. The first objection to the jurisdiction is, that if the libellant had a lien, it was lost by his not enforcing it prior to the vessel's proceeding to sea, after the damage was ascertained. If this were a proceeding under the state laws, for materials or repairs furnished to the vessel for her outfit, the objection would be substantial, as the statute expressly limits the lien in such cases to the time of the vessel first proceeding to sea. But if the libellant have a lien at all, it is under the general admiralty law, and is not extinguished by any such delay; the more especially, as the same parties are now owners of the vessel, who were owners when the injury was sustained. In the case of *The Rebecca* (Ware Reports 188), which was a libel for damages similar to the present, the vessel had made several voyages and had been twice sold before the libel was filed, and was then owned by third persons; but the court held, that unless there was gross negligence on the part of the libellant, the vessel remained liable in the hands of the purchaser. So in the case of "*The Ship Mary*" (U. S. circuit court for the district of New York, 1 Paine 180), which was a libel for seaman's wages, they had been discharged at New Orleans in August, 1819; in October following, the ship was sold to a bona fide purchaser and sent on a voyage to Liverpool, and from thence to New York, where she arrived in July, 1820; and was then libelled for the wages due to the men at New Orleans. It was in evidence that they had threatened to libel the vessel at New Orleans, but forbore to do so on the promise of the captain to pay them in New York. The court held that this amounted to nothing more than a forbearance on the part of the libellants, not to libel at that time, but not to a waiver of any remedy they might have if they were not paid by the captain, and the decree of the district court sustaining the libel was affirmed. Numerous other authorities might be adduced to the same point, but these are deemed sufficient.

The next objection is against the jurisdiction of the admiralty to enforce a claim of this nature against the vessel. It has been one of more difficulty, and has not I think, been formally decided in this district. In how many of the other districts the question has arisen, I am unable to say, for since the publication of Mr. Peters' collection (with the exception of the districts in the first and second circuits), very few of the decisions of the courts in admiralty have been published. I have been unable to find more than two cases in print, in which the direct question has been decided. The first is the case of *The Rebecca* (Ware's Reports 189). In that case, the libellants had shipped at New York ten hogsheads of liquor, to be safely delivered at Portland, the dangers of the sea only excepted, and alleged that in consequence of careless and improper stowage, they had been lost, and prayed process against the vessel, &c., for the damage.

The claimants denied the liability of *the vessel*, under any circumstances, to answer for the damage claimed by the libellant. After hearing the arguments of counsel, a very able and elaborate opinion was delivered by judge Ware, in which he reviewed the various authorities bearing on the question, and concluded by affirming the liability of the vessel to answer the claim, and the jurisdiction of the court to enforce it. The other case is that of *House & Cumming v. The Schooner Lexington*, reported in the 2d volume of the *New York Legal Observer*, p. 5, decided in January, 1843. In that case the libellant had shipped at Philadelphia, on board the schooner *Lexington*, a quantity of clover seed to be delivered in New York. Not being able to obtain a full freight for his vessel, the captain sent the seed by the transportation line across New Jersey. The agents of the line not being able to find the consignee, after three or four days stored the seed; and before it was offered to the consignee, clover seed had fallen in price, and he refused to receive it, on the ground that it had not been forwarded according to contract, and prosecuted his libel against the vessel for damages.

This appears to me a much stronger case for the common law courts, than the present or that of the *Rebecca*, yet the learned and experienced judge of that commercial district, in the course of his opinion says: "The doctrine that the shipment of goods or freight, creates an obligation maritime in its character, and which may be enforced in rem. against the vessel, I shall consi-

der so far settled by our own courts, as to furnish the rule of decision in this case"—and refers to the case of the Rebecca, as reported in 6th American Jurist, to 2d Gallison 238, and 1st Sumner 553, 206, 595.

The only case cited and supposed to be decided against the jurisdiction, is the case of Swain & Demarest v. The Brig Franklin, as quoted in Thompson v. Lyle, reported in 3 Watts & Serg. 166. The decree in that case was made by my learned and venerable predecessor, judge Hopkinson, and if it had been correctly quoted in the book, I would without hesitation follow the precedent of so distinguished a jurist, and consider the law as settled in this district, although opposed to the decision of other learned judges, whose decisions are not of binding authority here. But I have examined the record in that case, and been furnished with the judge's notes of the argument, and find the case entirely different from what it is supposed to have been. It was somewhat similar to the case of the schooner Lexington. The libellant had shipped a quantity of merchandise on board the Franklin at Philadelphia, to be delivered to certain persons at New Orleans, and intended to be by them forwarded to the libellants at Dayton, Ohio; by some mistake the goods were not delivered at New Orleans to the persons named in the bill of lading, but to another, who, finding the margin of the bill marked "John S. Rhea, Decatur, Ala.," and the goods being so directed, forwarded them to Alabama; after several transportations they reached the libellant in Ohio; and it was for the expense of their transportation and damage caused by the delay, that the libel was filed. In the course of the argument, the counsel for the respondents admitted that a bill of lading is a maritime contract, and if the damage had happened at sea, the vessel would have been liable, but contended that inasmuch as the vessel arrived in safety, and the goods were delivered at New Orleans, she was not liable for any mistake or error committed on shore. The learned judge did not decide the question, but said, as the decision either way would decide nothing finally, but be only preliminary to carrying the case to the circuit court, he would, *pro forma*, give a decree in favour of the plea to the jurisdiction, as that would be a final judgment, and allow of an immediate appeal; whereas a judgment in favour of the jurisdiction would be followed by a farther hearing on the merits, and attended

with delay. No appeal was however taken. This case was argued and decided in April, 1838. In October, 1840, the case of Van Syckle v. The Schooner Thomas Ewing and owners, was argued before the same learned judge. It was a libel charging that in March, 1840, the libellant had shipped a quantity of brandy and other liquors on board the schooner Thomas Ewing at Philadelphia, to be delivered in good order, the dangers of the seas only excepted, to consignees at Mobile, and that a large portion of the said brandy had been "wantonly, illegally, and contrary to the contract aforesaid," stove-in on deck and totally destroyed by the master, "without any sufficient or legal cause," during the voyage. The answer alleged as a justification, that it was necessary for the general safety and preservation of the vessel and cargo, and the case was heard on its merits.

In delivering his opinion the judge says: "No objection has been taken on part of the respondents, to the jurisdiction of the court nor to the proceedings *in rem.* against the body of the vessel, for compensation for the injury and loss complained of. I shall therefore give no opinion on these points." (See Hazard's Register for December 9th, 1840.) Although no direct opinion was given on the question of jurisdiction, I infer from this that the leaning of the judge was in favour of the jurisdiction. The case of the Franklin must have been within his recollection, and I do not think he would have undertaken a long and laborious investigation of the merits of the complaint, unless in his opinion the libel showed the court had jurisdiction. I am myself averse to extending the jurisdiction of admiralty courts beyond their well known and acknowledged limits. I would prefer that all cases of alleged breach of contract, should be referred to courts of common law and a jury, for determination. But it is more important that courts in different districts subject to the same laws, should have uniformity of decision. It does not seem proper that a person having a claim for the breach of a maritime contract in one part of the United States, should have a remedy different from or more advantageous to him, than a fellow citizen residing in an adjoining state. Therefore, until otherwise directed by superior authority, I shall hold that a claim such as the present is cognizable in the admiralty, and consequently the plea of the respondent to the jurisdiction of the court, is *overruled*.

IN THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE THIRD CIRCUIT, AND EASTERN DISTRICT OF PENNSYLVANIA.

[May 22, 1842.]

COOPER V. MATTHEYS.

1. An injunction will not be granted to restrain the violation of a patent or copy-right, where the defendant has been in possession a length of time, claiming by an adverse title, until the right is first settled at law; nor will it be granted in any case where the party applying for it has not shown good faith, conscience, activity and diligence, nor where there is any doubt or uncertainty as to the facts.
2. If, on a motion for an injunction, there appears from the affidavits of the parties or witnesses, such a repugnancy in point of fact as makes it necessary to decide as to the relative truth of their conflicting statements, or the credibility of the witnesses, the injunction will not be granted.
2. The loss of a patent issued under the act of 1793, which directs it to be recorded, is no excuse for the plaintiff's delay to apply for an injunction to restrain its violation, nor where his improvement or patent has come into public use during his inaction, or from a state of things of which he might have had notice by the use of due diligence, although he had no notice of the violation by the defendant.

On motion for an injunction to restrain the infringement of a patent, after bill filed and suit at law commenced at the same time. Argued by *J. R. Ingersoll* for plaintiff, and *William L. Hirst* and *James Todd* for defendant.

BALDWIN J. The plaintiff in his bill sets out a patent for a new and useful improvement in constructing carriages for rail-roads, granted in October, 1832, which he alleged was lost before 15th December, 1836, and a new one granted in October, 1839, for the same improvement; that he has sold the invention, reserving the right to use it; that it is used by his vendees, and that from the date of the patent the defendant had made and sold, and is now making for sale, carriages with the improvements patented, with notice of the patent, &c.

In a special affidavit attached to the bill, the plaintiff states that he is in possession of the improvement patented, and has made sales of rights to use and sell it to the persons, and for the sums specified: that defendant is a car builder, engaged in infringing the plaintiff's right. In an affidavit made before filing the bill, the plaintiff states that he sold the right to use his invention to the New Castle and Frenchtown Rail Road Company, in 1832, and knew of no others using it but himself

till 1835, when he found Leech's line using them, and gave notice to their agent at Johnstown, and one of the parties interested in that line, that he would bring suit, that he employed an attorney to sue another person who used the improvement, who he was informed settled for the same, that the patent was lost in 1836, and he has never been able to find it. That he knew of no persons infringing his right till lately, that he has resided in Johnstown since 1834, that he has but lately heard of the use of his improvement in Philadelphia, and lost no time in giving notice of his right, and forbidding the use thereof.

The bill was filed the 15th of April; on the 16th, defendant stated in an affidavit, that he had been engaged for three years past, and is still engaged as a master workman in making cars for the railroads in Pennsylvania, without any notice or application of the plaintiff, and never saw the model of plaintiff's improvement till the 14th inst., that to the best of his knowledge he has never used the plaintiff's improvement or any part of it, nor ever heard of its being patented, that he builds on his own plan as directed by the Pennsylvania engineers, and does not interfere with plaintiff's improvement; employs twelve hands, and is under a contract to build five cars for carriers on the Pennsylvania improvement. That he follows the plan of one Arnold, to whom he succeeded; that Arnold carried on the business many years in the same shop immediately preceding the defendant's taking it. In a supplementary affidavit on the 11th April, he states that Arnold made cars similar to what defendant makes since 1831 or 1832, without any claim by plaintiff, and that defendant has never built a car on plaintiff's plan, and does not intend to do it—that any sales made by plaintiff have been made within a few months past—that he never heard of any such sales till within two weeks, and will answer the bill.

Thomas B. Parker states in his affidavit taken 17th April, that he commenced building cars as a master workman in 1836, and continued to do so till 1839, on the same plan as Arnold and Mattheys, as directed by the engineers of Pennsylvania; that he never heard of plaintiff's patent till about the 1st of April, and first saw his model on the 15th; that he has never used plaintiff's improvement or intended to use it. By his counter affidavit on the 17th April, though plaintiff stated that

he never knew of the defendant's infringement of his right till a few days ago, or that it had been infringed by others, except those with whom he made arrangements, whom he names, and states the sums they paid him, and that the defendant's cars are a direct violation of plaintiff's patent by using the improvement specified. Peter Allison, in his affidavit on the same day, states that defendant uses the plaintiff's improvement in all its parts, and that the improvement is original. The defendant produced the affidavit of F. D. Sanno, that he saw cars on the Mauch Chunk railroad in 1836, which were constructed in the same manner substantially as those of the defendant and Parker, and that they were in common use as passenger cars.

On this state of the case as disclosed by the bill and affidavits, it will be assumed for the purposes of this motion, that the facts therein stated and not contradicted, are true, though they will not have the same effect as on a motion to dissolve an injunction on the coming in of an answer after the return of a subpoena, or on the final hearing of the cause. On the motion to award an injunction, the plaintiff must rest on the case stated in the bill, though he may by affidavit state any matters which it sets forth with more particularity, and a reference to collateral matters which explain, or which tend to support and strengthen it; he may, also, in the same way, contradict any statements made by the defendant in his affidavit, and either party may take and read the affidavits of other persons, 19 Ves. 621. But no affidavit of the defendant (or his answer in this stage of the case, which is considered an affidavit, 1 Russ. 362, 1 Cord, ch. 66, 19 Ves. 351, 1 L. & W. 570,) can be considered as evidence to overthrow any averments in the bill, not supported by other testimony; it is only affidavit against affidavit, on which the chancellor decides if he is fully satisfied how the fact may be; or if there is such contradiction in the respective affidavits as leaves him in doubt, he refers the matter to a master, or directs an issue to inform his conscience before deciding the motion.

In awarding an injunction a very delicate and highly responsible power is used, which ought not to be exerted when there is reasonable doubt as to the existence of any fact on which the application is founded. Dick. 600, Coop. 7. If there appears from the affidavits of the parties or witnesses, such a repugnancy in point of fact as makes it necessary to decide on



the relative truth of their conflicting statements or the credibility of the affirmants, no prudent judge will undertake so dangerous an inquiry in the first stage of the cause. Great latitude is allowed in order to present the application with all its attendant circumstances operating in favour of or against it, though the range may be wider than the bill. It depends on the matters of fact or law, which appears to be contested, whether the chancellor will examine the above case involving the respective rights of the parties. The great object is to look for that full information which will lead his mind to a certainty as to all material facts, for doubt or uncertainty is fatal to the motion to grant the injunction, 2 Ak. 182, Dick. 101, 1 Bald. 218, 4 Walk. 260—though it is a good cause for continuing it on a motion to dissolve, 3 V. 140, the burthen of proof being on the plaintiff in one case and on the defendant in the other. On the other hand if the bill or affidavit state any facts not denied in the affidavits on the part of the defendant, or the plaintiff by counter affidavits does not deny the statements of the defendant, such facts are assumed as a safe basis for a decision on the motion, though they may be open to inquiry at a subsequent state of the cause, and the matters of law involved in the motion will be considered with reference thereto.

The reason on which any action is declined, when there is an issue of fact between the parties or their affirmant, is obvious. By granting the injunction, positive credence is given to the affidavits on the part of the plaintiff, and those of the defendant are repudiated directly, whereas by refusing the injunction nothing more is done or intended than a decision that the fact is so doubtful as not to be safe to act on the assumption of its truth, thus leaving it entirely open to future investigation. It must be obvious too, that in applying for an injunction, the plaintiff seeks either to interrupt the course of the common law or to ask for some relief which he cannot have at law; he must consequently state and make out a case for equitable relief on such facts as bring his case within the jurisdiction of courts of equity and proper for its exercise. Hence if he fails to satisfy the conscience of the chancellor affirmatively, he has no case before him, for the doubt or uncertainty as to facts is of the same effect on a motion, as their non-existence.

In this case the grant of a patent to the plaintiff for the im-

provements specified, its validity, or his possession of the exclusive right to use it as stated by the plaintiff, or the fact of his using, selling and making contracts for its sale and use, is not controverted by the defendant, and will be assumed as sufficiently made out. Nor has the plaintiff contested the facts that the defendant is, and for three years has been, a car builder, or that Arnold, to whom he succeeded, was not so engaged for some years before—that either had notice of the patent or of plaintiff's claim otherwise than is stated, or denied that Parker had been engaged in building on the same plan as Arnold and the defendant, from 1836 to 1839. There is however, a direct issue between the parties on the fact of infringement of the patent right; by its positive averment on one side, and as positive a denial on the other, after having seen the plaintiff's model; though the defendant's first affidavit was to the best of his knowledge, his supplementary one is unqualified that he never used the plaintiff's improvements—so that, as both sets of affidavits cannot be true, the fact of infringement depends on which are entitled to credence. The exhibition of the models on which the parties construct their respective carriages, does not suffice to turn the scale either way, without an examination into the detail of the construction, combination and operation of all their parts by competent mechanics, who, on a comparison of the models, might decide the fact of infringement, if they concurred in opinion, but, if they differed, would leave it as doubtful as it is on the affidavits; and, as the fact depends on the substantial identity of the cars in their parts, combination and effect, with no other sources of information than the affidavits and an inspection of the models, it would be incurring great danger of error, were the infringement to be taken as proved on such evidence as has been exhibited by the plaintiff, when it is opposed by the oath of those who bring master-workmen in the construction of the cars, who must be equally competent to know whether the patent is violated or not. Assuming, then, that all the other averments in the plaintiff's bill and affidavits are true, he has not made out so clear a case of an infringement of his right, as to come within the rules of equity, as laid down by the court in the various cases which have arisen; he has not satisfactorily established the fact on which the motion turns, in the absence of which he has no case

at law or in equity, or, which is of the same effect on this motion, he has not so clearly established it as to leave no reasonable doubt or uncertainty respecting it. 4 Wash. 261. On this ground alone the motion must be overruled; but there are others equally decisive and more general, as well as more important, in their application. Taking the plaintiff's right to be unquestioned—assuming the violation by the defendant, as well as all the averments in his bill and affidavits to be true—they do not so account for the lapse of time before bringing a suit at law, or applying for an injunction, as to bring his case within the settled rules of equity, which require the plaintiff to be prompt in his application for that summary and prompt relief which is afforded only in cases where there has been due diligence in asserting his rights. Indeed, the nature of the relief points directly to its requisites; it is to protect from impending danger a right, or property, which the law cannot avert. If he acquiesces, or is inactive, while the danger exists or the mischief is done, it negatives the necessity of action in equity, unless the inaction is accounted for.

The loss of his patent is no excuse for delay. It was issued under the act of 1793, which directed it to be recorded. 1 Story 301. A copy could have been obtained, which would have been as full evidence of his right as the original. 5 Pet. 241. A new patent issued under the 3d section of the act of 1837, gave no better evidence of his right, than a copy of the old one; nor afforded any additional protection. 4 Story 2547. The case stands, therefore, as if the original patent had not been lost. The want of actual knowledge of the infringement by the defendant and Parker or Arnold, is not, under the circumstances of the case, a sufficient excuse. The plaintiff states in his first affidavit, that he knew of the use of his improvement on Leech's, in 1835; that his residence for the last six years has been at the end of the western section of the Pennsylvania railroad, and that he then gave notice of his patent, &c.; but he does not state that he has brought suit, or permitted the use of his improvement by that company. This is such knowledge of a public use on one end of the great line of transportation traversing nearly the whole state; and there is such a connexion between the railroads and intermediate canal, that notice of the infringement at one end, by one of the transportation companies, gave the strongest

reasons for believing that it had happened at the other end, such as ought to have led to prompt inquiry to ascertain the fact, which was easily done. Under such circumstances, the want of knowledge is so far evidence of negligence in not preventing the public use of the invention patented, both by the construction and use of the carriages on which it is used on the great route of transportation, as to impress on the case such laches as leaves the plaintiff to his remedy at law. The inquiry is not whether the plaintiff had notice of the violation of his right by the defendant, but whether his improvement has come into public use during his inaction on a state of things of which he might have had notice by the use of due diligence, or when the law of equity deems negligence to be the same as notice. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; while these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court. 9 Pet. 416-17, *Piatt v. Battius*, cited from 3 B. C. 640. This principle is peculiarly applicable to motions for injunction in cases of patent and copyright, and has been uniformly applied to them. It will not be granted against a party who has been led into the publication by the encouragement and acquiescence of the author. Jac. 311; 1 Con. Ch. 14, 18. When the author suffers time to run on the violation of his right—where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the party had led to a state of things which occasions the application, and therefore will refuse or dissolve an injunction, without saying in whom the right is. 4 Con. Ch. 140. Or where the copyright is admitted, if the violation has been of long continuance. 19 Ves. 447-8. An injunction will not be granted to restrain a party who has been in possession any length of time, claiming by a title adverse, till the right is first settled at law. 7 Ch. 165; 6 Jac. 20; 19 Ves. 448; 1 Cox 182; 6 Ves. 51. A plaintiff who states such a case, puts himself out of court. 4

Jac. Ch. 22. It is a proper remedy to protect a possession till it appears to be against right, but is never used to disturb a possession under claim and colour of right. 1 V. Len. 476, S. P. 4 Wash. 260-61.

Had the plaintiff used due diligence in asserting his right, when he knew of its violation in 1836; had he put himself on inquiry whether others had violated, or were about to violate it, and sought relief by a prompt application, his case as stated in the bill and affidavits, was a proper one for an injunction.

The sale of his invention, its use by himself and vendors, was sufficient evidence of an exclusive possession by claim and colour of title, so that equity would have protected in the continued enjoyment, whatever doubts might have existed as to the validity of his patent. 6 Ves. 707-8. Such possession would have been secured from disturbance, till on a trial or a final hearing, it should appear to be without right. 3 Mer. 628.

The rule on which courts of equity act by an injunction in the first instance, is to leave the parties in the same position as it finds them when the application for relief is made, by protecting the plaintiff in the same possession which he had before enjoyed, and when the possession of the defendant had been unmolested, leaving the right of possession to be settled at law.

No cases come before courts of equity, in which a greater degree of diligence is required, than applications for injunctions, 2 Dow. 6, 536; their nature and effect are such as to produce the most irreparable injury when they are improvidently granted. Time, which bears heavily on all rights or violations of right which are not asserted with diligence, has run on the possession of Arnold and the defendant for eight or nine years, and of Parker for three, by which the use of the plaintiff's improvement has become public, without any resort to legal remedies till the present application was made.

Had this public use existed before the application for the patent, with the consent of the plaintiff or with his knowledge and acquiescence, it would have been void, as held in *Pennock v. Dialogue*, 2 Pet. 18, 20, and as expressly declared in the 15th section of the act of 1836. 4 Story 2511. If then, the want of actual knowledge of the long continued construction and public use of cars, on the plaintiff's plan, shall be considered as sufficiently accounting for his inaction, it will follow that an injunc-

tion will be granted, notwithstanding the lapse of time, unless the defendant will make out such a case after the patent has issued, as would make it void if it had existed before the application; in other words, such a case as would justify the presumption of abandonment, or dedication of the improvement to the public. Such a principle cannot be adopted without reversing the established course of equity, and confounding cases where the injunction is applied to protect a right or continue a possession till the right is decided; it would also operate most severely and unjustly on the plaintiff, if the same state of things which would defeat the injunction on a motion, would annul his patent on a trial, which must be the result if the public use before a patent is applied, which avoids it, must be made out after it is granted in order to prevent an injunction. Equity acts on different principles in protecting the possession of the plaintiff, or declining to disturb the defendant; it leaves the rights of the parties as they stand at law. Though a plaintiff may have been wanting in that degree of diligence which entitles him to relief in equity, yet that alone does not impair his right or remedy in damages at law.

A defendant, though enjoined in equity from interrupting the possession of the plaintiff, may contest the right at law to the same extent as if equity had not interfered. In refusing the injunction in this case, no more is done or intended, than to decide that the plaintiff has not made out a case which entitles him to any relief which he cannot have at law. Every right which he may have to damages in the pending suit remains wholly unimpaired, and if he establishes his right and its violation on the trial, he will be entitled to an injunction on the final hearing of this cause. The motion for an injunction, however, in this case, rests on much narrower ground than has been thus far assumed in favour of the plaintiff. On the actual posture of the case, there are two objections to the injunction, which in the words of my predecessor, "are insurmountable" and "fatal." The positive denial that the defendant makes cars upon the plan of the plaintiff's asserted improvement, and his averment that the cars he makes do not interfere with the plaintiff's patent, is not disproved; and from the uncontradicted affidavits on the part of the defendant, it appears that the cars made by him, Arnold and Parker, were in public use from the date of the original patent. On both

grounds, therefore, this case comes fully within the principles of *Isaacs v. Cooper*, 4 Wash. 259-60. The infringement is denied, the plaintiff's possession was not exclusive, and excepting the sale to the New Castle company, all the acts which evidence the actual enjoyment of his improvement, were subsequent to the actual possession and continued use by the defendant, of the plan on which he now constructs his cars, or, at most, simultaneous herewith. In addition to which, the plaintiff has failed in showing that due diligence which is indispensable to give him a standing in a court of equity, before a trial of his right to interrupt the defendant in the practical, useful, and public employment, in which he has been actively engaged for years. As just regard to private right as well as public convenience, forbids the exercise, in such a case, of the high, delicate, and dangerous power now invoked; the courts of this circuit, and its judges, have exerted this part of their jurisdiction with great caution, always declining it in a doubtful case, or one not brought forward by a party who was vigilant, nor ever disturbing the course of the common law, by awarding to a party that extraordinary remedy in equity which goes beyond the rules of law, unless he presents a case clearly within those established rules and principles which are the basis of equity jurisprudence.

The motion for the injunction is, therefore, *overruled*.

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NOTE.—We have published in the foregoing pages the elaborate opinion of the late Mr. Justice Baldwin, in the case of *Cooper v. Mattheys*, on the subject of granting injunctions, particularly in reference to restraining the infringement of patent and copy rights. This opinion comprehends the whole learning of the subject of granting injunctions; and the principles which it settles, have since been uniformly adhered to by the court, in the exercise of this important branch of their jurisdiction. This decision was published on the 22d May, 1842, (a few days after it was pronounced,) in the Public Ledger, but the few copies that were preserved, has rendered the case less known, and therefore less useful than a larger acquaintance with it, and easier access, will effect.—EDITORS.

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## RULES OF DISTRICT COURT.

THE following are the rules published by the District Court for the city and county of Philadelphia, November 8, 1845, modifying the rules on the subject of pleading adopted April 1, 1842; also a new rule relative to the speeches of counsel.

## RULES ADOPTED NOVEMBER 8, 1845.

1. The rules relative to pleading in *assumpsit*, covenant and debt, adopted on the first day of April, 1842, are repealed, so far as they are compulsory on defendants; and pleas in the said actions, may be pleaded in such forms as were used and approved before the adoption of the said rules, and with like effect.

2. The said rules are continued in force as rules to be observed at the election of defendants.

3. The plea of *non assumpsit* and the plea of *non est factum*, when pleaded under the said rules must appear to be so pleaded, either on the face of the plea or by indorsement thereon, signed by the party or his attorney.

4. The rule which prohibits the parties from addressing the jury by more than one counsel, after the evidence in the cause on trial is closed, is repealed in cases where all the issues in fact to be tried by a jury are upon special pleas, and in cases where the plea of *non assumpsit* or the plea of *non est factum* is pleaded under the said rules, either with or without other special pleas.



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## ACCOUNT RENDER.

THE pleadings in an action of account render, after a judgment *quod computet*, are difficult and troublesome. The more recent works do not contain so particular and systematic a narrative of the different steps to be taken subsequent to this judgment, as a careful practitioner would desire, and he is obliged, therefore, to resort for the approved forms of pleading, to the books of entries of an elder date, which, on account of their scarcity, are accessible to comparatively but few. This consideration has induced us to lay before our readers the pleadings in the above action subsequent to the judgment *quod computet*, which is the first important step in the suit. They are taken from Brownlow's Entries (English) tit: Account Render.

On referring to the following forms, it will be seen that an important question is likely to arise some day, respecting the operation of the act of the 12th July, 1842, to abolish imprisonment for debt, upon the process of *capias ad computandum*. The first section of the act just cited, excepts from its operation, process as for contempt to enforce civil remedies, &c.

In the case of a bill in chancery to account where the respondent is decreed to account, it is presumed that process of attachment to enforce obedience to that decree, would be valid under the operation of this section. This proceeding, however, is in analogy to the common law method of compelling a defendant to account where judgment *quod computet* has been rendered against him. Whether the courts would hold it lawful since the act before mentioned, to issue a *capias ad computandum* against

a defendant who refuses to account voluntarily, we do not undertake to say. It is probable that the legislature had not this particular case in view. We deem this a point worth suggesting to the profession. Assuming, however, that the courts would sustain this process, we have thought it would not be unacceptable to the profession nor to our readers, to have a copy of the entry of the proceedings, after the interlocutory judgment has been rendered. The action, though a very useful one, and a very important one in Pennsylvania, it is conceded, is not generally well understood. Approved forms serve as a useful and safe guide to the practice. The form of the condition of the recognizance, where the defendant after being brought in on the *capias*, is let to bail, is adapted to the exigency of the proceeding, and has respect as well to the condition as to the subsequent proceedings in court.

The pleadings are as follows:

*Judgment quod computet.*

Therefore it is considered that the said C. do account with the aforesaid T., of the time and moneys aforesaid, &c.<sup>1</sup>

*Award of capias ad computandum.*

Afterwards, to wit, the ——— day of ———, in the year &c., it was commanded the sheriff of ———, that he take the aforesaid C., if &c., and him safely keep, so that he have his body here the ——— day of &c., to account with the aforesaid T. of the time in which he was the receiver of the moneys of the said T., whereof he is convicted.

*Return of the capias ad computandum.*

And now here at this day come as well the aforesaid T. by his attorney aforesaid, as the said C. in his proper person (by virtue of a writ &c. of *capias* to account taken) here brought to the bar, and he is committed to the prison of the county &c., by reason of the premises, there to stay until &c.

*Auditors assigned.*

And the said C. saith that he is ready to account thereof with the said T. &c.: and thereupon O. G. and R. T. are assigned auditors by the court here, to hear the account aforesaid; which

<sup>1</sup> Bail is not required if the defendant confess the action and ask that auditors be assigned to him.—Eds.

said auditors have assigned to the said C. the ——— day of ———, in the year ———, at ——— o'clock in the afternoon of the said day, at the office of ——— at ———, to account with the said T.

*The defendant bailed.*

And hereupon, N. T. of ——— &c. and T. H. of ———, personally appeared here in court, and undertook for the aforesaid C., in the sum of one hundred dollars; and the said C. likewise present in the same court, did assume for himself in the sum of two hundred dollars, that he the said C. will appear before the said auditors at the office of ——— aforesaid, at the aforesaid day and hour above assigned; and so from day to day, at every day and place by the aforesaid auditors to be assigned, until the account aforesaid shall be ended. And also that he will appear before the judges of the said court here, at the day by the said auditors to be appointed to the said C., when the said auditors shall deliver their account here in court; and so from day to day at every day which shall be assigned to him by the said court, until the plea thereof shall be determined, and the judgment thereof given, and to render himself to the jail of the said county until he shall satisfy the arrearages found upon him, if judgment shall happen to be given against him; which said one hundred dollars the said N. T. and T. H. have acknowledged and each of them hath acknowledged, to be made by the lands and chattels of either of them; and which said two hundred dollars the aforesaid C. hath acknowledged to be made of his lands and chattels, to the use and behoof of the said T. to be levied, if it shall happen the aforesaid C. shall make default at any day of the plea or judgment to be against him; and if the said C. shall not render himself upon the said judgment, to the prison aforesaid, there to remain in the same until he shall satisfy the arrearages upon him found.

*The account before the auditors.*

At which said day, to wit, the ——— day of ———, in the year ———, at ——— o'clock in the afternoon of the said day, at the said office of the said ———, came as well the aforesaid T. by his attorney, as the aforesaid C. in his proper person; and the said O. G. and R. T. there likewise came. And the said auditors on the said ——— day of ———, do deliver the account

*Account Render.*

of the aforesaid C. of the said ——— dollars before them at the said day and hour and place—the tenor whereof followeth in these words.

“The account of C. late of &c., before O. G. and R. T., auditors to hear the account in the court of ———, before the judges of the said court at ——— in the county of ———, by the said court assigned, of the time in which the said C. was receiver of the moneys of the said T., that is to say, from the ——— day of ———, in the year &c., until the ——— day of ———, in the year &c.

“The said accountant rendereth his account of the said ——— dollars, whereof in the said court at the suit of the said T., he is convicted to account of the moneys of him the said T. by the said C., by the time aforesaid at C. in the said county, by the hands of A. S. received, to render a reasonable account to the said C. when he should be required.”

*Plea of payment.*

The said C. prayeth allowance of the said \$100, and saith that he ought to be discharged thereof, because as to twenty dollars of the said \$100, he saith that after the aforesaid 20th day of ———, in the year ———, and before the said 1st day of December in the year ———, that is to say, on the 20th day of June in the year &c., at B. aforesaid, he paid to the said T. the said twenty dollars, to the proper use of him the said T.: and this he is ready to verify, and thereof he requireth allowance, and that he may be wholly discharged thereof. And as to seventeen dollars of the aforesaid \$100, he the said C. saith that after the aforesaid 20th day in the year aforesaid, and before the said 1st day of December in the year &c., that is to say, on the 20th day of August in the year &c., at B. in the county aforesaid, he paid to the said T. the said seventeen dollars, to the proper use of him the said T.: and this he is likewise ready to verify, and prayeth allowance of the said seventeen dollars out of the said \$100, likewise parcel; and that he may be thereof likewise discharged. And as to sixty-three dollars, residue of the said sum of \$100, he the said C. saith that he after the said time in which it was supposed that he the said C. received the said \$100, that is to say, the ——— day of ——— at B. in the county aforesaid, by the

appointment and command by him the said T., paid the said A. S. the said sixty-three dollars, residue of the aforesaid one hundred dollars: and this likewise he is ready to verify, and prayeth allowance of the said sixty-three dollars, residue of the aforesaid one hundred dollars, and that he may be likewise thereof wholly discharged.

*Replication to the foregoing pleas.*

And the said T. as to the aforesaid twenty dollars, parcel of the said one hundred dollars, which the said C. supposeth himself to have paid to the said T. on the said 20th day of June in the year &c. aforesaid, saith that the said twenty dollars ought not to be allowed to the said C., nor any part thereof, because he saith that the said C. hath not paid to said T. the said twenty dollars, nor any part thereof, in manner and form in which the said C. hath above alleged, and this he prays may be inquired of by the county.

*Joinder in issue.*

And the said C. doth the like.

*Second replication.*

And as to the said seventeen dollars, parcel of the said one hundred dollars which the said C. supposeth himself to have paid to the said T. on the said 20th day of August, the said T. saith that the seventeen dollars ought not to be allowed to the said C., nor any part thereof, because he saith that the said C. hath not paid to the said T. the said seventeen dollars, nor any part thereof, in manner and form as the said C. hath above alleged: and this he likewise prayeth may be inquired of by the county.

*Joinder in issue.*

And the said C. doth the like.

*Replication to the third plea.*

And as to the said sixty-three dollars, residue of the said one hundred dollars, which the said C. supposeth himself to have paid to the said A. S. on the ——— day of ——— at ———, by appointment and command of the said T., he saith that the said sixty-three dollars, residue of the aforesaid one hundred dollars, ought not to be allowed to the said C., nor any part thereof, because he says that the said C. hath not paid to the

said A. S. the said sixty-three dollars, nor any part thereof, in manner and form as the said C. hath above alleged: and he prays that this also may be inquired of by the county.

And the said C. doth the like.

*Award of venire facias juratores.*

Therefore, to try as well that issue, as the aforesaid other issues above joined, it is commanded to the sheriff of the said county, that he cause to come here &c., &c.

**THE PROSECUTING ATTORNEYS OF PHILADELPHIA.**

WE take pleasure in extracting from the report of the grand jury of the court of quarter sessions of Philadelphia, for November term, 1845, the following passages referring to the prosecuting attorneys of the county, WILLIAM D. KELLEY and FRANCIS WHARTON Esqrs.

They accord only merited praise. These gentlemen have now discharged the unceasing labours of their office for nearly a year to the entire satisfaction of the bar, the bench, and the public; and in that space of time have evinced their superior fitness for the post they continue to occupy, not less by their uniform success, than their obliging courtesies to all who have occasion to consult them. The attorney-general, Mr. Kane, has happily selected for his deputies, two gentlemen who possess the integrity, attainments, and ability requisite to command respect from the community whose interests are entrusted to their care, and necessary to ensure an upright and successful performance of their thankless task.

The following are the passages referred to.

"The grand jury take great pleasure in testifying their approval of the vigilance and conscientious discharge of duty, by the deputy attorneys-general, Messrs. William D. Kelley and Francis Wharton, who have manifested great desire to bring all the violators of our laws to punishment.

"These gentlemen have at last, we trust, got such evidence as will bring some of the vendors of lottery tickets and policies to just punishment, for deluding and defrauding those who are duped by the bright prospects held out by their schemes."

IN THE COURT OF QUARTER SESSIONS FOR THE  
CITY AND COUNTY OF PHILADELPHIA.

[September Sessions, 1845.]

IN THE MATTER OF THE COMMUNICATION OF THE GRAND JURY.

1. Grand juries: their powers and duties: mode of instituting criminal proceedings in Pennsylvania—ordinary and extraordinary. How far criminal proceedings may be had without a preliminary hearing: How far a grand jury can originate criminal proceedings, where no preliminary hearing of the accused has been had; and where neither court nor attorney-general submits such inquiry to them.
2. Where a grand juror prefers a charge against a citizen, and where neither the accusing grand juror nor the body of in the grand inquest, possesses such knowledge of the crime and the offender, as will enable the inquest to make a legal presentment of the offence, the court will not summon and swear witnesses at the request of the grand jury, to support such charge. They will in such case, refer the accuser to the ordinary tribunals.

THE following opinion was delivered by the president of the court, on Saturday, October 4, 1845, all the judges being present and concurring. The character of the communication addressed by the grand jury to the court, is sufficiently set forth in the following opinion.

KING, president: On the 26th September, the grand jury presented a written communication to the court, in which they state that it had been *charged* before them by one of their members, that Richard L. Lloyd and Benjamin E. Carpenter, had been guilty of certain offences against the 17th section of the act of the 16th of April, 1845, in that, being officers within the commonwealth, to wit, the said Lloyd, treasurer, and the said Carpenter, a member of the said board, they had at certain days and times, converted to their own use, public money, entrusted to them for collection, safe keeping and disbursement, and had aided and abetted, or been accessory to such conversion by others: which said *charges* are now pending and under investigation before the grand jury. They farther state, that

to enable them to perform this duty, they require process to call before them such additional witnesses as they may deem necessary to examine into the subject; and request the court to make the necessary order, for the procurement of such witnesses and evidence as they may call for, and particularly for certain witnesses whom they name, and for the production of the books and vouchers of the Board of Health, for the payment of money since the passage of the said act, and the bills for the same. *They also desire the court not to regard this as a presentment, but as a mere communication.* The immediate question before us, is whether we ought to compel the attendance of the witnesses named, and coerce the production of the books and papers enumerated in this communication.

The first impressions of this question, may not present it as one involving much intrinsic difficulty or importance. But a more careful view of the principles involved in the inquiry, and of the consequences that may flow from the precedent, established by a compliance with the requisition of the grand jury, must cause us to pause and ponder before we take the required step. Any and every innovation in the ancient and settled usages of the common law, calculated in any respect to weaken the barriers thrown around the liberty and security of the citizen, should be viewed with jealousy, and trusted with caution. Aware from the experience of the past, that the most dangerous and fatal assaults on the public liberty, have been perpetrated under the forms of law, and under the pretext of its vindication, the framers of our constitution have interposed strong, and what they no doubt presumed adequate guards against such abuses. "The people," says the declaration of rights, "shall be secure in their *persons, houses, papers,* and possessions, from unreasonable searches and seizures; and no warrant to search any place or to seize any person or things, shall issue without describing them, as nearly as may be, nor without probable cause, supported by oath or affirmation." In all criminal prosecutions, the accused hath *the right* to be heard by himself and his counsel, *to demand the nature and cause of the accusation* against him, and to meet the witnesses face to face. These are solemn asseverations of the fundamental principles of civil liberty, admonishing those charged with the administration of justice, that while the commonwealth demands the vigorous execution



of her humane criminal code, she seeks not its vindication, at the expense of the just rights of her citizens.

For the purpose of more clearly indicating the principles by which we have been guided in coming to the conclusions about to be expressed, it will be necessary to go into a somewhat elementary explanation of the manner in which by the laws of Pennsylvania, criminal proceedings are usually originated. This course is calculated to throw much light on the question for decision; by enabling us to compare what has been done, with what is now required to be done; and thus to test its admissibility by principles. Criminal proceedings in Pennsylvania, may be properly divided into ordinary and extraordinary. With the former or ordinary mode of procedure, every citizen of common intelligence is familiar. A warrant of arrest founded on probable cause, supported by oath or affirmation, is first issued against the accused by some magistrate having competent jurisdiction. On his arrest he hears "the nature and cause of the accusation against him," listens to the testimony of the witnesses "face to face," has the right to cross examine them, and may resort to the aid of counsel to assist him. It is not until the primary magistrate is satisfied by proof that there is probable cause that the accused has committed some crime known to the law, that he is farther called to respond to the accusation. He is then either bailed, or committed to answer before the appropriate judicial tribunal, to whom the initiatory proceedings are returned for farther action. On this return, the law officer of the commonwealth prepares a formal written accusation, called an indictment, which with the witnesses named in the proceedings as sustaining the accusation, are sent before a grand jury composed of not less than twelve, nor more than twenty-three citizens, acting under oath, only to make true presentments; who again examine the accuser and his witnesses, and not until at least twelve of this body pronounce the accusation to be well founded by returning the indictment a true bill, is the accused called upon to answer, whether he is guilty or not guilty, of the offence charged against him. No system can present more efficient guarantees, against the oppressions of power or prejudice, or the machinations of falsehood and fraud. The moral and legal responsibilities of a public oath, the liability to respond in damages for a malicious prosecution; are caution-

ary admonitions to the prosecutor at the outset. If the primary magistrate acts corruptly or oppressively, in furtherance of the prosecution, and against the truth and justice of the case, he may be degraded from his judgment seat. By the opportunity given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defence, a thing of the hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defence unless he is informed, not merely what is charged against him, but when, where, and how, he is said to have violated the public law? It is not true that a bill of indictment found, without a preliminary hearing, furnishes him this vital information. It practically neither describes the time, place nor circumstances, of the offence charged. Time is sufficiently described, if the day on which the crime is charged, is any day before the finding of the bill, whether it is the true day of its commission or not. Place is sufficiently indicated, if stated to be within the proper county, where the indictment is found: and circumstances are adequately detailed, when the offence is described, according to certain technical formula. Hence the inestimable value of preliminary, public investigations, by which the accused can be truly informed, before he comes to trial, what is the offence he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place, by which the first intimation to an accused of the pendency of a proceeding against him, involving life or liberty, should be given, when arraigned for trial under an indictment; the keen sense of equal justice, and the innate detestation of official oppression which characterizes the American people, would make it of brief existence. It is the fitness and propriety of the *ordinary* mode of criminal procedure, its equal justice to accuser and accused, that render it of almost universal application in our own criminal courts, and make it unwise to depart from it, except under special circumstances, or pressing emergencies.

These specialties give rise to the *extraordinary* modes of criminal procedure which will now be considered.

The first of these is, where criminal courts of their own

motion, call the attention of grand juries to, and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions, rather bear on things than persons; the object being the suppression of general and public evils, affecting in their influence and operation communities rather than individuals; and therefore, more properly the subject of general than special complaint. Such as great riots that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances affecting the public health and comfort; multiplied and flagrant vices tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries directed by them, summon, swear, and send before the grand jury, such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offence and the offenders. But this course is never adopted in case of ordinary crimes, charged against individuals. Because it would involve, to a certain extent, the expression of opinion by anticipation, on facts subsequently to come before the courts for direct judgment; and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, the court act under their official responsibilities, and must answer for any step taken, not justified by the proper exercise of a sound judicial discretion.

Another instance of extraordinary proceedings, is where the attorney general ex-officio prefers an indictment before a grand jury, without a previous binding over or commitment of the accused. That this can be lawfully done, is undoubted. And there are occasions where such an exercise of official authority would be just and necessary, such as where the accused has fled the justice of the state, and an indictment found, may be required previous to demanding him from a neighbouring state, or where a less prompt mode of proceeding might lead to the escape of a public offender. In these, however, and in all other cases, where this extraordinary authority is exercised by an attorney-general, the citizen affected by it is not without his guarantees. Besides, the intelligence, integrity, and independence, which always must be presumed to accompany high

public trust, the accused unjustly grieved by such a procedure, has the official responsibility of the officer to look to. If an attorney-general should employ oppressively, this high power, given to him only to be used when positive emergencies or the special nature of the case requires its exercise, he might be impeached and removed from office for such an abuse. The court, too, whose process and power is so misapplied, should certainly vindicate itself, by protecting the citizen. In practice, however, the law officer of the commonwealth always exercises this power cautiously; generally under the directions of the courts, and never unless convinced that the general public good demands it.

The third and last of the extraordinary modes of criminal procedure known to our penal code, is that which is originated by the presentment of a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring on it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser, and except that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by this court. And it is equally true, that in making such a presentment, the grand jury are entirely irresponsible either to the public or to individuals aggrieved; the law giving them the most absolute and unqualified indemnity for such an official act. Had the grand jury on the present occasion made a legal presentment, of the parties named in their communication, the court would, without hesitation, have ordered bills of indictment against them, and would have furnished the grand jury with all the testimony, oral and written, which the authority we are clothed with would have enabled us to obtain. While the power of presentment is conceded, we think no reflecting man would desire to see it extended a particle beyond the limit fixed to it by precedent and authority. It is a proceeding which denies the accused the benefit of a preliminary hearing; which, in consequence of being

instituted without a prosecutor, prevents him from demanding the endorsement of the name of the persecutor on the indictment before he pleads, a right he possesses in every other case, and which takes away all his remedies for malicious prosecution, no matter how unfounded the accusation on final hearing may prove to be. A system which certainly has in it nothing to recommend its extension.

In thus describing the various kinds of what we have called extraordinary criminal proceedings, it will be perceived we have discovered none analogous to that before us. It has neither originated from an inquiry directed by the court, nor from an ex-officio indictment preferred by the attorney-general; nor from a presentment by the grand jury. The two first of these it obviously is not, and the last the grand jury tell us with great distinctness, they do not intend it to be. What then is the true position of things before the grand jury at the point at which our aid is invoked? One of their number has preferred a charge before the body, against two respectable citizens holding responsible public trusts, which, if established in law and fact, must consign them to the penitentiary for not less than *six* months nor more than *five* years. The accuser does not seem to be in possession of facts adequate to induce the grand jury to make a legal presentment of the offence and the offender. And we are invoked to supply the deficiency, by compelling the attendance of certain members and officers of the board of health, and the production of the books and papers of that public corporation, in order to enable the grand jury to ascertain whether this charge so preferred, is sufficiently well founded to require the presentment of the accused. We assume, that without the adduction of the testimony required, and the elimination from that testimony of farther proofs of guilt, the grand jury are unable to make a presentment. Because if within their own body they had sufficient proofs, they would of course have made an absolute presentment and not a communication asking aid. A compliance with this request is the concession of the principle that grand juries have authority on their own motion to entertain criminal accusations against individuals, not given them in charge by the court; not exhibited by the attorney-general on his official responsibility, and not sufficiently existing in their own knowledge to justify a presentment.

This is a grave question, involving results of the most vital character in the administration of criminal jurisprudence. In recognising now, the propriety of the requisition of the grand jury and our obligation to comply with it, we establish a precedent, determining that each and every member of this and every future grand jury, may *ex-officio* prefer criminal charges against any citizen, and that although the accuser possesses no adequate knowledge from which the grand jury can make a presentment, the court are required to supply this knowledge, by compelling the adduction of persons and papers in support of the charge. When we reflect that penal accusations in this shape, must necessarily be secret, affording the accused no information of their existence until they assume the shape of an indictment; when we reflect that no opportunity is given the accused of hearing, in the first instance, what is testified against him, nor any means of ascertaining the nature, time, place and circumstances of the offence attributed to him; when we reflect that the accusation is made without responsibility, be the charge vexatious, humiliating and degrading to the last degree; there certainly should be some direct and binding authority establishing the orthodoxy of such a doctrine, before we should adopt it.

We are without such judicial precedent in the courts of this commonwealth. And on principle we are of opinion that such a mode of procedure adopted by grand juries in Pennsylvania, would be alike dangerous to the safety of the citizen, as it would be destructive of that veneration and respect which ever attaches to this dignified body, when moving within the limits of its appropriate orbit. Grand juries are high public functionaries, standing indifferent between accuser and accused. They are the great security to the citizen against vindictive prosecutions, either by government, or by political partizans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize a presentment. Nor should courts give unadvisedly aid or countenance to any such innovations. For if we are bound to

send for persons and papers to sustain one charged by a grand juror before the body against one citizen, we are bound to do so upon every charge which every other grand juror, present and future, following the precedent now sanctioned, may think proper hereafter to prefer. It is true, that in the existing state of our social organization, but partial and occasional evils might flow from grand juries receiving, entertaining, and acting on criminal charges against citizens not given them in charge by the public authorities, nor within their own cognizance. But we cannot rationally claim exemption from the agitations and excitements which have at some period of its history convulsed every nation. Those communities which have ranked among the wisest and the best, have become, on occasions, subject to temporary political and other phrenzies, too vehement to be resisted by the ordinary safeguards provided by law for the security of the innocent. Under such irregular influences, the right of every member of a body like a grand jury, taken immediately from the excited mass, to charge what crime he pleases, on whom he pleases, in the secret conclave of the grand jury room, might produce the worst results. It is important also in the consideration of this question, to be borne in mind, that the body so to be clothed with these extraordinary functions, is perhaps the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment. That the action of such a body should be kept within the powers clearly pertaining to it, is a proposition self-evident; particularly where a doubtful authority is claimed, the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights, secured by the constitution. Our system of criminal administration is not subject to the reproach that there exists in it an irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury, in direct criminal accusations, are confined to the investigation of matters given them in charge by the court; of those preferred before them by the attorney-general; and of those which are sufficiently within their own knowledge and observation to authorize an official presentment. And they cannot, on the

application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity, introduced into the grand jury room, might subject him to. And it conserves the dignity of the grand jury, and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and the accused, instead of assuming the office of the former.

We have less difficulty in coming to these conclusions, from the consciousness that they have no tendency to give immunity to the parties named in the communication of the grand jury, if they have violated any public law. The charge preferred by the grand juror alluded to in the communication, is clear and distinct. It is one over which every committing magistrate of the city and county of Philadelphia has jurisdiction. Any one of this numerous body may issue his warrant of arrest against the accused, his subpœna for the persons and papers named, and may compel their appearance and production. And if sufficient probable cause is shown, that the accused have been guilty of the crimes charged against them, he may bail or commit them to answer to this court. The differences to the accused between this procedure and that proposed, are, that before a primary magistrate, the defendants have a responsible accuser, to whom they may look, if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witnesses, face to face. They may be assisted by counsel, in cross examining those witnesses, and sifting from them the whole truth. And not the least, they by this means know what crime is precisely charged against them; and when, where, and how it is said to have been perpetrated—rights which we admit and feel the value of, and of which we would most reluctantly deprive them, even if we had the legal authority to do so.

On the whole, we are of opinion, that we act most in accordance with the rights of the citizen, most in conformity with a wise and equal administration of the public law, by declining to give our aid to facilitate the extraordinary proceedings proposed against the parties named in the communication of the



grand jury; and by referring any one, who desires to prosecute them for the offences charged, to the ordinary tribunals of the commonwealth, which possess all the jurisdiction necessary for that purpose, and can exercise it, more in unison with the rights of the accused, than could be accomplished by the mode proposed in the communication of the grand jury.

In giving the results of our united and unanimous reflections, on this important question, we probably may have used expressions which might be construed into a reflection on the grand jury. We most distinctly disclaim any such intention. We believe the grand jury to have acted throughout, with the most perfect conscientiousness and integrity; and to have had no desire either to usurp a jurisdiction not given to them by law, or to infringe upon any legal right possessed by the accused. We believe them to have come into this court seeking through their communication, to know from us what the law of the commonwealth on this subject is, and desiring and intending when they had ascertained, to conform to it. They had the clear right to ask for instruction; and our duty is as clear, to impart it. The manner in which this instruction has been asked, is both respectful and decorous; and our answer is given in the same spirit, and we trust will be so received.

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IN THE DISTRICT COURT OF PHILADELPHIA.

[November 22, 1845.]

JEANES *v.* FRIDENBERG.

1. An attorney is not privileged as a witness from communicating facts concerning his client, where he himself is a party to the transaction or agreement which he is called upon to disclose; therefore, it was held, that an attorney who was summoned as garnishee in an *attachment sur judgment*, was bound to answer to interrogatories, whether he had received from his client a sum of money in trust to pay a certain per centage to such of his creditors as would accept the same in full satisfaction of their respective debts.
2. An attorney is not to judge what is or is not privileged from disclosure. He must state the occasion and circumstances of the act or communication, and the general nature of the matter alleged to be privileged, so that the court may decide whether he shall be compelled to testify or not.

In this case an attachment sur judgment was issued, and served upon Henry M. Phillips esq., one of the attorneys of this court.

The following interrogatories addressed to Mr. Phillips were filed:

1. Have you within the last three months received of the above defendant certain moneys, in trust to pay twenty-five per cent. on the several debts due by the said defendant, to each and every of his creditors who would accept of the said twenty-five per cent., in full satisfaction of his or their respective claims? If so, state particularly the amount so received by you, and when the same was received.

2. Have you within the last three months, and if so, when, received of the said defendant, or of any other person or persons, and if so, of whom, any moneys in trust to pay or distribute the same to and among the several creditors of the said defendant, or to such of them as would accept a certain percentage or proportion of their debts in full satisfaction thereof, and how much money has been so received by you?

3. Had you paid out any, and if so, how much of the said moneys at the time the above attachment was served on you, and how much thereof then remained in your hands, to wit, on the first day of September, 1845?

To which Mr. Phillips put in the following answer under oath:

The respondent Henry M. Phillips, protesting that he is not bound to answer, says as follows: My only relation with the defendant, Mone Fridenberg, has been professional; he has been my client, and I have been his lawyer, and I have never received any money, property or information, from him, in any other than in a professional capacity, and in the relations above stated; and I therefore respectfully submit to the court, that I am not bound to answer the interrogatories filed, because all information which my answers or any of them would give, has been derived by me professionally, and in the confidential relations I occupy towards the defendant. Otherwise than as counsel for the defendant, I know nothing in answer to the interrogatories propounded. My refusal to answer proceeds from no unwillingness on my part, but because I believe I have no right to do so, without the express consent of my client, which has not been given me, and I therefore respectfully submit to the court this as my full answer to so much of the interrogatories filed in this case as I can answer.

This was a rule for a judgment against Mr. Phillips for want of a sufficient answer.

*Mr. John Fallon* for the rule, cited 19 Johns. 135; 14 Pick. 421; 6 Eng. Chan. Rep. 519.

*Mr. William L. Hirst*, contra.

SHARSWOOD, J. This court has heretofore decided that money raised on execution, and received from the sheriff by the attorney of the party, cannot be attached in his hands. In the possession of the sheriff it is in the custody of the law, and equally so in that of the attorney, who is an officer of the court, whose duty it is immediately to transmit or pay it to his client—a duty which the court by a summary proceeding will compel him to perform. How far the money of a client placed by him in the hands of his attorney for professional purposes, is liable to process of attachment, has not yet been decided, nor is it now presented for decision.

Mr. Phillips, the garnishee in this case, declines answering the interrogatories addressed to him, because, he says, his only relation with the defendant has been professional, and that he has never received any money, property or information from him, in any other than a professional character. We are to decide therefore, not whether the money, if any, in his hands is subject to attachment, but whether he is bound to disclose the fact of his receipt of it, as well as on what occasion, under what circumstances, and for what purposes he received it.

It may be assumed, that if the garnishee would be privileged as a witness from testifying to the matters inquired of, he cannot be compelled to discover them in this proceeding. The right which a party has to resist a discovery in a court of equity, of communications made to him in his professional capacity, and the right which a witness has in either a court of law or equity, to decline giving testimony of such communications, rest upon the same principles. *Stratford v. Hogan*, 2 Ball & Beatty 164; *Grenough v. Gaskell*, 1 Mylne & Keene 98.

It is no doubt very important, that the privilege of the client in regard to matters confidentially communicated by him to his counsel, should be maintained in its full vigour. The object of the rule however, is principally the proper conduct of judicial investigations, to which the full and free disclosure of the client to his professional adviser is essential (*Moody & Malk.* 33, note);

and it is equally important to preserve the limitations which have been placed upon the privilege, so as to prevent it from being employed as an instrument to embarrass, evade or defeat that justice which it is intended to subserve.

It is now well settled that the privilege is not confined to cases where a suit is either pending or expected, but extends to all cases where the counsel is applied to in the line of his profession. If touching matters that come within the ordinary scope of professional employment, he receives a communication in his professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, he is not only justified in withholding information thus derived, but bound to do so; (*Grenough v. Gaskell*, 1 *Mylne & Keene* 98; *Cromack v. Heathcote*, 4 *Moore* 357, S. C.; 2 *Brod. & Bingh.* 4; *Doe d. Shellard v. Harris*, 5 *Carr. & Payne* 592; *Clark v. Clark*, 1 *Moody & Rob.* 3; *Parker v. Carter et al.*, 4 *Munf.* 273; *Foster v. Hall*, 12 *Pick.* 89; *Hatton v. Robinson*, 14 *Pick.* 421; *Beltz-hoover v. Blackstock*, 3 *Watts* 20); and the court will not permit him to make the disclosure, even if he should be willing, (*Good-light v. Bridge*, *Lofft.* 26,) unless indeed the client whose privilege it is, expressly consents. *Merle v. Moore*, 2 *Carr. & Payne* 275, S. C.; *Ryan & Moody* 390.

It is not confined however, to facts communicated verbally or in writing by the client, but extends to such as he has acquired by his own personal observation in consequence of such communication. Thus he will not be compelled to produce or state the nature or contents of a deed or paper delivered to him by his client. *Nixon et al. v. Mayoh*, 1 *Moody & Rob.* 76; *Rex v. Woodley*, *ibid.* 390; *Kingston v. Gale*, *Finch. R.* 259; *Viner's Abr. Discovery* 1; *Bate v. Kinsey*, 1 *Crompt. Mees. & Rosc.* 43; *Doe d. Strode v. Seaton et al.*, 2 *Ad. & El.* 171; *Doe d. Peter v. Watkins*, 3 *Bingh. N. C.* 421; *Brard v. Ackerman*, 5 *Esp.* 119; *Harris et al. v. Hill et al.*, 3 *Stark.* 140; *Jackson v. Burtis et al.*, 14 *Johns.* 391; *Coveney v. Tannahill*, 1 *Hill* 33. So he cannot when examined as a witness, be asked, whether a document shown to him by his client in the course of a professional interview, was then in the same state as when produced on the trial. *Wheatley v. Williams*, 1 *Mees. & Wels.* 533; *Brown v. Payson*, 6 *N. Hamp.* 443. See *Baker v. Arnold*, 1 *Caines* 157; *Brandt v. Klein*, 17 *Johns.* 335. If an attorney, in searching for a deed

belonging to his client, should find another which might operate to his prejudice, he would not be bound to produce or disclose it. If therefore, a document be exhibited to an attorney in pursuance of a confidential consultation, all that appears on the face of such document is a part of the confidential communication. *Abinger c. b.*, in 1 Mees. & W. 533.

Lord Ellenborough has indeed said in broad terms, that "one sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both, has been from his situation as attorney;" and in a case where the question was as to the fact of the destruction of a deed by the party in the presence of the attorney, he considered it as a transaction with which the witness had only become acquainted from being employed as attorney, and excluded the testimony. *Robson v. Kemp*, 5 Esp. 52. While lord Tenterden was evidently disposed to restrict the privilege within limits entirely too narrow, lord Ellenborough in this case seems to have stretched it to its farthest extreme, if not beyond the true boundary line. *Grenough v. Gaskell*, 1 Mylne & Keene 98; *Wadsworth v. Hamshaw et al.*, 2 Brod. & Bingh. 5, n.; *Williams v. Mundie*, Ryan & Moody 34. See *Rothwell v. King*, *ld.* Nottingham's MS., 2 Swanst. 221, note; *Coveney v. Tannahill*, 1 Hill 33.

It is certain however, that an attorney is not privileged as to all facts of which he may acquire personal knowledge from his situation as attorney. Lord Eldon has told us that "the distinction is extremely nice between the questions which the attorney is bound to answer, and those which he is privileged from answering." *Parkhurst v. Lowten*, 2 Swanst. 201. Whoever will take the trouble of examining all the cases, will discover the difficulty of drawing from them any general rules or principles. Lord Brougham has attempted a classification of what he calls the apparent exceptions to the privilege, and the one material to our present question, he states thus: "Where there could not be said, in any correctness of speech to be a communication at all, as where for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant, (and even this has been held privi-

leged in some of the cases"). *Grenough v. Gaskell*, 1 Mylne & Keene 98.

It would perhaps be a more general, and at the same time more simple and intelligible expression of this exception, to say, that the privilege does not extend to facts coming to the knowledge of the attorney, only as a natural or accidental consequence of his occupying that situation, and not derived by him either directly or indirectly, in consequence of any confidential communication made to him. Thus it is clear that he may be compelled to testify to the fact of his employment as attorney, and by whom, (*Beckweth v. Benner et al.*, 6 Carr. & Payne 681; *Gillard v. Bates*, 6 Mees. & Wels. 547; *Studdy v. Sanders et al.*, 2 Dowl. & Ryl. 347; *Levy v. Pope*, Moo. & Malk. 410; *Cherac et al. v. Reinicker*, 11 Wheat. 280), to the identity of his client as the person who subscribed and swore to an answer in chancery, though he was present only in consequence of his professional character, (*Doe d. Jupp v. Andrews*, Cowp. 845; *Rex v. Watkinson*, 2 Stra. 1122, note by reporter; see 1 Hill 38), to the handwriting of his client, though he obtained his knowledge only from having witnessed his execution of the bailbond, in the action in which he was retained, (*Hurd et an. v. Moring*, 1 Carr. & Payne 372; *Johnson v. Daverne*, 19 Johns. 134), to the fact of his own or his client's possession of deeds or papers, with a view to lay the ground-work of secondary evidence, though not as we have seen to produce them or disclose their contents or character, (*Rothwell v. King*, ld. Nottingham MS., 2 Swanst. 221, note; *Bevan v. Waters*, Moo. & Malk. 235; *Eicke v. Nokes*, Moo. & Malk. 303; *Lessee of Rhoads v. Selin et al.*, 4 Wash. C. C. Rep. 718; *Brandt v. Klein*, 17 Johns. 335; *Jackson v. M'Vey et al.*, 18 Johns. 330), to the fact of the execution of a deed or instrument of writing, and that whether he attests it or not, though he shall not detail any confidential conversation which may have taken place at the time, (*March 83*, pl. 136; *Sandford v. Remington*, 2 Ves. jr. 189; lord Say & Seal's case, 10 Mod. 40; *Robson v. Kemp*, 5 Esp. 52; *Doe d. Avery v. Roe*, 6 Dowl. P. C. 518; *Hatton v. Robinson*, 14 Pick. 421), to the fact of the payment of a sum of money, though it prove simony in the client so as to induce a forfeiture, (*Parkhurst v. Lowten*, 2 Swanst. 201), to the fact that the consideration of a deed prepared by him was usurious, (*Duffin v. Smith*,

Peake's N. P. C. 108), though both these last cases may be referred to a class where he is required to testify to the fact of communications made by or to him with other parties, though by the direction or on behalf of his client, (*Spencely q. t. v. Schulenburg*, 7 East 357; 3 Smith 325; *Turner v. Railton*, 2 Esp. 474; *Ripon v. Davies*, 2 Nev. & Man. 310; *Griffith v. Davies*, 5 Barn. & Ad. 504; *Baugh v. Cradock*, 1 Moo. & Rob. 182; *Cleve v. Powel*, *ibid.* 228; *M'Tavish v. Denning*, *Anthon's N. P. C.* 113), to the fact that the client had asked him a *matter of fact* for information, as to a communication the attorney had made to others, the object of the evidence being to prove an act of bankruptcy committed by the client, (*Bramwell v. Lucas*, 2 Barn. & Cressw. 745), and finally to the fact of mere extraneous statements made by the client not relating to the subject matter, in regard to which the attorney is consulted or employed. *Brandt v. Klein*, 17 Johns. 335; *Riggs v. Denniston*, 3 Johns. Cas. 203; *Gillard v. Bates*, 8 Dowl. P. C. 774; 6 Mees. & Wels. 547.

These are all cases in which the attorney is but a witness; but there is a class which stands upon higher, and still clearer and more unequivocal ground, where the line is distinctly and broadly marked, and that is, where the attorney is himself a party to the transaction or agreement which he is called upon to disclose. *Wilson v. Rastall*, 4 T. R. 759; *Duffin v. Smith*, Peake's N. P. C. 108; *Coveney v. Tannahill*, 1 Hill 33; *Hatton v. Robinson*, 14 Pick. 421; *Heister v. Davis*, 3 Yeates 4. If the privilege were suffered to be applied to such cases, a wide door would be opened for the successful perpetration of fraud and crime. Attorneys would be selected as the agents or trustees wherever a cover of darkness was needed; and though but few might be found base enough so to prostitute their high and honourable profession, yet the character of the whole bar would be injured and degraded by the conduct of those few, for whom the temptation would be too great.

From the interrogatories propounded to the garnishee in this case; we cannot perceive that the answer would necessarily involve a breach of professional confidence. Should it be simply in the affirmative, that he had received of his client a sum of money in trust to pay twenty-five per cent., or any other per centage, to each of his creditors who would accept the same in

full satisfaction of their respective debts, or in trust to distribute and pay the same among his creditors generally, such a transaction would not be protected from disclosure. It would present the case of a mere agency or simple trust—which could as well have been confided to any one else as to an attorney—not in the line of his profession—requiring for its execution no legal skill—and which could in no sense be said to have been committed to him in consequence of his professional character. *Bramwell v. Lucas*, 2 Barn. & Cressw. 745. Nor would the court in consistency with its established principles interfere in such a case, by a summary process to compel the attorney to execute the trust, any more than if it had been a simple agency to collect rents or other dues, or if the assignment of this fund in trust for these purposes had been by a formal deed; and this it has been said, is one criterion by which to determine whether the privilege exists in cases of this character. *Turguand et al. v. Knight*, 2 Mees. & Wels. 98; *Exparte Aitken's executors*, 4 Barn. & Ald. 47; *Exparte Yeatman*, 4 Dowl. P. C. 309.

The garnishee in this case declares on oath, that he has never received any money, property or information, from the defendant in any other than his professional capacity, and it has been argued that this is a sufficient answer. The whole current of authorities however, from the first to the last, without a single exception, shows that he is not the judge of what is or is not privileged from disclosure. He must state the occasion and circumstances of the act or communication, from which the court will decide whether he shall be compelled to testify. *Coveney v. Tannahill*, 1 Hill 33. There are several instances in which general demurrers to bills in equity, and to interrogatories addressed to witnesses in chancery, expressed in the same general terms as that before us, have been overruled. *Kington v. Gale*, Finch R. 259; *Viner's Abr. Discovery* 1; *Rothwell v. King*, 2 Swanst. 221, n.; *Spencer v. Luttrell*, *ibid.*; *Vaillant v. Dode-mand*, 1 Atk. 524; *Parkhurst v. Lowten*, 2 Swanst. 201. Indeed there are cases in England, and one in the supreme court of this state, in which it was held that where it appears to be impossible that the client can be injured by the disclosure, the privilege does not exist, as the reason of it fails, (*Copeland v. Watts et al.*, 1 Stark. 95; *Corsen v. Dubois*, 1 Holt 239; *Hamilton v. Neel*, 7 Watts 517), decisions which necessarily



imply that the court has a right to know in the first instance, not only the occasion and circumstances, but the general nature of the matter alleged to be privileged. If this were not so, it is plain that all the salutary limitations and restrictions which have been placed upon the privilege, would be defeated in many cases by an unscrupulous, an ignorant, or at best a partial judge, as the attorney might be, and the privilege itself thus rendered in effect unrestricted, would be found altogether intolerable in the practical administration of justice.

On the whole then, we are of opinion, that the garnishee has not set up a sufficient ground for not answering, and unless he desires to put in an answer, the rule for judgment must be made absolute.

NOTE.—Mr. Phillips immediately put in his answers.

[November 11, 1845.]

RICHARDS V. BRITTIN.

1. Plaintiff held a mortgage against five adjoining houses, which were described as three parcels, Nos. 1, 2 and 3. On a writ of *levari facias*, the sheriff sold the property in that order, No. 1 bringing a price sufficient to pay in full the debt, interest and costs. There were no other liens enforceable against the premises: Held, that the sale of Nos. 2 and 3 was irregular; and as to them the sale was set aside.

The plaintiff held a mortgage of \$1500 on the premises sold under the *levari facias* on this case, which was the first lien on the premises.

The premises sold consisted of five houses adjoining, and were described and sold in three parcels, Nos. 1, 2, 3.

No. 1 sold for \$2200, which was sufficient to discharge in full the whole debt, interest and costs, in this case.

No. 2 sold for \$1000, and No. 3 for \$1100. The plaintiff was also the holder of a second mortgage on the same premises for \$3000.

No process for the recovery of the second mortgage was issued, nor had the sheriff any other execution in his hands, except the *levari facias* in this case.

H. H. Allen, terre-tenant, asked to have the sheriff's sale set aside as to Nos. 2 and 3.

*The court set aside the sale of parcels Nos. 2 and 3, on the ground that the only lien enforceable at that time by the sale of the premises, was satisfied by the sale of parcel No. 1; and the sheriff had no authority by his writ to proceed farther.*

[November 22, 1845.]

WORTHINGTON V. WORTHINGTON.

1. Under the act of the 13th of June, 1840, which allows real estate lying in one or more adjoining tracts, in different counties, to be taken in execution, the court require, that to entitle the inquisition to the approbation of the court, notice shall be given to the defendant of the time and place of holding the same, according to the 46th section of the act of 16th June, 1836, and an affidavit filed. If the defendant demand it, the inquisition must be held on the premises, according to the 47th section of the same act; and the motion to approve the inquisition cannot be made before the Saturday succeeding the return day of the writ, when the inquisition, if in other respects regular, will be approved, unless exceptions have been filed.
2. The inquest is not to ascertain whether that part of the tract which lies beyond the sheriff's bailiwick, can be sold separately from that within it, without prejudice to the whole, but whether the part taken in execution situate within the sheriff's bailiwick, can be sold separately.

*A fi. fa.* had issued in this case, upon which the sheriff returned that he had seized and taken in execution: First, a lot with the improvements thereon, in Byberry township, Philadelphia county, describing it by metes and bounds, containing eighty-nine perches, more or less. Second, a lot (adjoining the first described lot, and part of the same tract), situated in the county of Bucks, describing it by metes and bounds, containing four acres and eighty-nine perches, more or less, which remained in his hands unsold for want of buyers; and he returned an inquisition by him held, by which it was found, "that that part of the land taken in execution by virtue of the said writ, which is situate in the county of Bucks (and more particularly described in the said schedule as No. 2), cannot be sold separately and apart from that part of the said land (more particularly described in the said schedule as No. 1), situate in the county of Philadelphia, without prejudice to or spoiling the whole thereof, and that it will be to the interest of the defendant in the said writ and his legal representatives and creditors, that the whole of the said land be sold together and as one tract, to wit,

that portion thereof situate in the county of Philadelphia, and that portion thereof situate in the county of Bucks, the metes and bounds whereof are more particularly set forth in the said schedule hereto and the said writ annexed." The inquisition also finds, "that the rents, issues, and profits of the said described premises or property, by me the said sheriff taken in execution by virtue of the said writ, are not of a clear yearly value beyond all reprises sufficient, within the space of seven years, to satisfy the debt and damages in the writ aforesaid mentioned." And it also values and appraises the said described premises at the sum of one thousand dollars.

*Mr. Knight*, for the plaintiff, now moved the court to approve the said inquisition.

SHARSWOOD J. It is enacted by the 12th section of the act of 13th June, 1840 (Pamph. L. p. 689; Purd. 429), that when "any part of any lands or real estate, which lie in one or more adjoining tracts in different counties, has been or shall be taken in execution, under any writ of *fiery facias* or writ of *levary facias*, issued out of any court in either county, it shall be the duty of the sheriff to summon an inquest, for the purpose of ascertaining whether that part of said land, which has been taken in execution, can be sold separately and apart from the other part of said land lying in the adjoining county or counties, without prejudice to the whole, or to the interest of the defendant or defendants, or any of his or her lien creditors or other person who may be interested in the proceeds thereof; and also how much and what part of said lands in such adjoining county or counties ought to be sold with that part taken in execution as aforesaid, describing the same by metes and bounds." If the inquest find that the part taken in execution cannot be separately sold without prejudice to the whole, and the inquisition returned shall be approved by the court, a writ to sell the whole is then directed to be issued.

There is no provision, however, on the subject of notice to the defendant of the holding of the inquest, or that if the defendant desire it shall be held on the premises. This has been carefully attended to by the legislature in the ordinary case of an inquest, to ascertain whether the property will pay the debt in seven years: and it is clear that the inquiry authorized by this act may be of as much if not more importance to the de-

fendant. It is right therefore that he should have the opportunity of being heard before the jury. Here the same inquest has acted also as a jury of condemnation; and it is to be presumed that the sheriff, according to his duty, gave notice of the holding of the inquest for that purpose; but the presumption does not arise that he notified the defendant of the other purpose for which the inquest was held, as the law has not made it his duty to do so. The court has deemed it proper therefore, for the regulation of the practice in such cases hereafter, to say, that in order to entitle the inquisition to the approbation of the court, notice must have been given according to the provisions of the 46th section of the act of 16th June, 1836, entitled "An act relating to executions," and an affidavit thereof filed; if the defendant demand it, the inquest shall be held on the premises, according to the 47th section of the same act; and that the motion to approve the inquisition shall not be made before the Saturday succeeding the return day of the writ, when the inquisition, if in other respects regular, will be approved, unless exceptions have been previously filed.

The inquisition now presented to us for approbation is not however regular. The sheriff returns that he has seized and taken in execution the land in Bucks, as well as that in Philadelphia county. The act of 13th June, 1840, gives him no such power; and he certainly has it not independently of that act. It expressly provides, that where the sheriff has taken in execution a part of a tract lying in adjoining counties, he shall summon an inquest to ascertain whether *the land taken in execution* can be sold separately from that which is situated in the adjacent county. If the inquest find that it cannot, then a writ issues which authorizes the sheriff to sell the whole. There are no words empowering him to seize the lands out of his bailiwick in the first instance.

This irregularity would not however be fatal to the proceedings; for upon application of the sheriff the court would allow him to amend his return. But a more material and irremediable error occurs in the inquisition. The inquest find that the part in Bucks county cannot be sold separately from that in Philadelphia county, without prejudice to the whole. This is not the question submitted to them by the act of assembly, but on the contrary, whether the part *taken in execution*, to wit, that in

Philadelphia county, can be sold separately. It may very well happen, that where the part in one county has been taken in execution and must be sold, that it would be beneficial to all parties in interest to sell the whole tract together; and yet this might not be the case if the part taken in execution and to be sold is that which lies in the other county. It may not be for the interest of the defendant, that the part in the adjacent county should be sold at all. It may be his interest as well as his wish to keep it. It may be a complete farm in itself, without the field or woodland taken in execution over the line: and though if the farm were to be sold, it might be better to sell the adjacent field or woodland with it, yet in the case supposed the farm has not been taken in execution, and is not necessarily to be sold. In the present instance, the part seized and taken in execution in this county contains eighty-nine perches, while that in the adjoining county contains four acres and eighty-nine perches. The part in this county may be sufficient to satisfy the execution. The defendant may prefer to let it be sold separately, and to keep the rest; and if there is no other person interested who objects, he has a right to do so. The law will not take and sell a man's property against his will, unless it be necessary to enforce the rights of other parties.

Mr. Knight, therefore, takes nothing by his motion.

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## IN THE ORPHANS' COURT OF CHESTER COUNTY.

### GRAHAM *v.* GRAHAM'S EXECUTORS.

1. A. made his last will, commencing with the introductory clause: "And as to what worldly estate it has pleased God to bless me with in this life, I give and dispose of the same as follows." After directing his debts to be paid and giving a small legacy, he ordered the residue of his personal estate to be appraised, and that it should remain to be occupied by his widow "during her natural life, or that she remains my widow, as well as that of my real estate, which real and personal she is to occupy as aforesaid, excepting as hereinafter mentioned." That if any of his unmarried children should marry, it was left to his wife's discretion to give them such support as she saw proper; the same to be deducted out of their shares of his estate: that his unmarried daughters and two minor sons, T. and J., should have suitable support, along with their mother out of his estate, until they should marry or his minor sons went to trades; after which the said sons were to receive necessary clothing, while at trades, and no more, until a "dividend" of his estate should be made, as thereinafter mentioned: that his fulling-mill should remain at the discretion of his wife and unmarried daughters, to receive the rents for their mutual support, and of his minor sons, "until the death of my

wife, or of her marriage;" but in case of the death or marriage of his wife before his daughter Rachel arrived at the age of twenty-one years, then his property was to remain, to be occupied by his unmarried daughters, for their mutual support, until that period: in case his wife should marry, she was to draw out of his estate, when divided, an equal share with his children, in lieu of dower: *that after the marriage of his wife, if that should take place*, and after his daughter Rachel arrived at full age, his executors were to dispose of the whole of the real and personal estate at public sale, and divide the proceeds equally, "to and among my wife, in case of her marriage as aforesaid, and each of my children share and share alike, except my son James Graham, *which I give and bequeath* the sum of one dollar, lawful money, to be paid out of my real and personal estate, and no more, which legacies I give and bequeath unto each of them or the survivors of them or to their lawfully begotten heirs and assigns forever." By a codicil the testator gave to his wife, "one hundred dollars more and in addition to what was heretofore bequeathed to her." The wife died without having again married. Held, that it was the intention of the decedent to die testate, as to all his property, and to provide for an equal distribution of the proceeds of the real estate among his children, *except James*, and to effect this intent and prevent a failure of the devise, the court would supply, by implication, the words "or death," inadvertently omitted in the clause directing a sale by the executors.

2. The general rule in the construction of wills. To effect the intent, a mistake may be corrected or an omission supplied.
3. To prevent a will from failing of effect altogether, a devise or bequest will be implied, if there be any thing to designate the person to take.
4. Introductory words expressive of an intention to dispose of the whole of the testator's estate, will not, of themselves, create a testamentary disposition, but if it be dubious whether an estate is omitted or not, they will help the interpretation, and may be called in aid of a devise by implication.

James Graham, one of the sons of Neal Graham, presented his petition to the orphans' court, setting out that his father died in the year 1832, first having made his last will, of which he appointed Henry Kurtz and Mordecai Evans, executors, directing them to dispose of the whole of his real and personal estate, at and after the marriage of his wife, and the arrival of his daughter Rachel at the age of twenty-one years: that his said wife was since deceased, *without having married again*, and the said Rachel of full age, therefore the said real estate was undisposed of, by the said will: that the personal estate was exhausted in payment of debts, and a portion of the real estate sold by the sheriff, and the balance of the proceeds, after payment of liens, received by the executors, who had filed an account of their administration, which was confirmed by the court and showed a balance in their hands, due to the estate, of \$594, all of which is the proceeds of the sale of the real estate: that the executors refused to pay to the petitioner any portion

of the funds in their hands, and therefore, prayed the court for a citation against the said executors, commanding them to be and appear, &c., and show cause why a decree should not be made commanding them to distribute the said fund to and amongst the petitioner and the other heirs of the deceased, according to the intestate laws.

- A citation issued in pursuance of the prayer of the petition, to which the executors appeared and pleaded, in substance, that the said Neal Graham died, first having made his last will, afterwards duly proved, by which he devised: "And as to what worldly estate it hath pleased God to bless me with in this life, I give and dispose of the same as follows: And first, I order that my just debts and funeral expenses be paid out of my personal estate: Secondly, I give and bequeath my silver watch unto my son Thomas Graham, without charge: Thirdly, I order all the remainder of my personal estate to be appraised, and no person shall be permitted to take any part thereof at the appraised price, but that it remain to be occupied by my well beloved wife, during her natural life, or that she remains my widow, as well as that of my real estate, which real and personal she is to occupy as aforesaid, excepting as hereinafter mentioned, unless some of my unmarried children should see cause to marry; in that case I leave to my wife's discretion to give them what support she may think proper, charging them with the same, to be deducted out of their share of my estate; and farther it is my will and I do order that my unmarried daughters and two minor sons, Thomas and Isaac, have suitable support along with their mother out of my estate, except or until they or either of them should marry, or my minor sons go to trades, after my aforesaid sons to receive necessary clothing while at trades, and no more, *until a dividend shall be made of my estate, as hereinafter mentioned*; and farther, it is my will that my fulling-mill be at the discretion of my wife and unmarried daughters, to let it to such person or persons and on such terms as they see fit, towards their mutual support and that of my minor sons as aforesaid, until the death of my wife or of her marriage, together with the apparatus thereunto belonging; but in case that my two sons before mentioned, should not see proper to go to trades, but to earn their livelihood for themselves from their mother, then their support to cease, ex-

cept their mother see cause. But in case the death or marriage of my wife shall or should take place before my daughter Rachel arrives at the age of twenty-one years, in that case my will is that my property remain to be occupied by my unmarried daughters, for their mutual support until that period; but in case my wife should see cause to marry, in that case my will is that she draw out of my estate, when divided, an equal share with my children, that is to say, a child's part and no more, in lieu of dower; and farther it is my will, and I do order, *that at or after the marriage, if that should take place, of my wife, and at or after my daughter Rachel arrives to the age of twenty-one years*, that my executors, hereinafter named, dispose of the whole of my real and personal estate at public sale, and of the proceeds, after deducting necessary expenses, *to be equally divided to and among my wife, in case of her marriage as aforesaid, and each of my children, share and share alike, except my son James Graham, which I give and bequeath the sum of one dollar, lawful money, to be paid out of my real and personal estate, and no more, which legacies I give and bequeath unto each of them or the survivors of them, or to their lawful begotten heirs and assigns forever.*" That by a codicil annexed to the said will, the said testator bequeathed to his wife one hundred dollars "more and in addition to what was heretofore bequeathed to her," and to his son Thomas one hundred dollars "more and in addition to what was heretofore bequeathed to him," &c.; that the said legacy bequeathed to the said James was heretofore, to wit, &c., tendered by the defendants to him; that although true it is the said wife of the said Neal is deceased, without having married again, and the said Rachel is of full age, yet the said Neal has, in and by his said last will, well and sufficiently devised and disposed of the said real estate, and did not die intestate as to the same. To this plea the defendant demurred.

*Darlington*, for the plaintiff, stated the question to be, whether the testator died testate or intestate as to his real estate, and insisted that the event upon the happening of which the executors were empowered to sell, to wit, the marriage of the wife, had never happened, and as no other or farther disposition of his estate was made, his estate, in the events which had occurred, was to be considered as intestate property, and to



descend and be distributed according to the intestate laws. That here, in respect of the real estate, there was only a bequest of the proceeds of the sale of the land, to be made by the executors, but in the contingency, to wit, the marriage of the widow, which had not taken place, and that the will was to be operative in that event alone, was clear from that portion of it which gave a child's part to the wife, and the codicil giving her one hundred dollars in addition. An heir at law is not to be disinherited except by express devise or necessary implication, and here there was no intention to disinherit the son James sufficiently manifested, except upon the happening of the particular event, which had not taken place. 1 Roper on Legacies 351; *Dean v. Gaskin*, Cow. 657; *Thomas v. Thomas*, 1 R. 112; *Boskert v. Evans*, 5 Wh. 562. Where a legacy is given on a condition precedent, the condition must be strictly performed, otherwise the legacy does not vest. 1 Rop. on Leg. 501, 514.

*Mr. Lewis*, for the defendant, argued, that an intent was apparent to give all the estate of which the testator died seized or possessed, from the introductory words of the will. That another intent was manifest, viz. to exclude James in favour of the widow and other children in every event, for it could not be supposed the former was to be shut out, in case of remarriage of the widow, and let in on the estate in the event of her death, for which distinction no reason could be shown. That here was an express devise of the proceeds by force of the words, "which legacies I give and bequeath unto each of them," &c.; that taking the whole will, it was evident the proceeds were to go to the children except James, after the death of the widow, and that a devise of the proceeds was a disposition of the estate itself.

He cited *Ward on Leg.* 194; 18 Law Lib.; *Carlisle v. Canning*, 3 R. 489; *Reed v. Reed*, 9 Mass. R. 372; *Wright v. Barrett*, 13 Pick. R. 44; 1 John. Ch. R. 495; *Hickman v. Hazelwood*, 33 Eng. Com. L. R. 38; *Pratt v. Pratt*, ib. 44; *Ward on Leg.* 201.

The opinion of the court was delivered as follows, by

*BELL*, President. The only question presented by the pleadings in this case is, whether under the circumstances which have happened, Neal Graham died testate or intestate as to his real estate? The right decision of this question depends on the due

construction of his last will and testament, dated January 2d, 1830, and the codicils thereto.

In the construction of wills, there is no maxim of such universal application, and therefore none so trite, as that courts are bound to find out the intention of the testator, if it be possible to do so, and to make such a construction as will effectuate that intention. In searching for it we are to consider the whole will, and no matter how imperfectly or obscurely it may be worded, if it contain that within its four corners from which the meaning of the decedent may be fairly inferred, the law says it shall be carried into effect, unless it would contravene some well established legal rule. For this purpose a mistake may be corrected or an omission supplied, if it be clear from the context that there is such mistake or omission. Ward on Legacies 203; 18 Law Lib. And to prevent a will from failing of effect altogether, a devise or bequest will be implied, if there be any thing to designate the person to take. Per Gibson c. j., in *Thomas v. Thomas*, 1 Rawle 112. Again, it is said that where there is no doubt of the intention to give, and the words of gift are omitted by mistake or inadvertence, the court will supply them by implication (*Bibin v. Walker*, Amb. 661, cited in 1 Pow. on Dev. 334, No. 1), which is defined to be such a strong probability of intention as that a contrary intent cannot be presumed. 2 ib. 199.

Bearing these rules in mind, let us turn to the will before us, and see whether there be such a strong probability of intention to dispose of the estate in question, under the circumstances which have happened, as that a contrary intent can not be presumed. If there be, it has already been shown that omitted words will be supplied, rather than the will should altogether fail.

The introductory words of this will show an intent to make a testamentary disposition of his whole estate, under any and all circumstances. "As to what worldly estate it hath pleased God to bless me with, I give and dispose of the same as follows." Here is no reservation or restriction as to quantity, quality, or contingency. His whole worldly estate he gives and disposes of. It is true that these words, unconnected with any particular devise, will not carry an estate that is clearly omitted, or of themselves create a testamentary disposition; but if it be

dubious whether the estate be omitted or not, they will help the interpretation, and may be and constantly are called in aid of a devise by implication. *Busby v. Busby*, 1 Dall. 226.

In this instance, taken in connexion with the subsequent devises and bequests, they are almost irresistibly indicative of a determination by the testator not to die intestate in respect of any of his property, and I think, from the whole will, it is equally clear that in no event did he intend that his son James, the complainant, should take more than the pecuniary legacies bequeathed to him by the principal instrument and codicil.

The first object of the testator's bounty was his wife. To her he gave an estate of freehold *durante viduatate*. She was to have all his real as well as personal property "during her natural life, or that she remains my widow," charged, however, with the suitable support of his two unmarried daughters, and two minor sons, Thomas and Isaac, until they or either of them should marry, or the minor sons sent to trades, after which they were to receive necessary clothing, *and no more*, "*until a dividend shall be made of my estate as hereinafter mentioned.*" It is obvious, that at this moment the testator contemplated the division, erroneously called dividend, "*hereinafter mentioned,*" was without fail to be made at some time, for it cannot be pretended that he intended, under any set of circumstances, to disinherit his minor sons, and yet by the terms of the will, they were to receive no more than necessary clothing after they went to trades, until the division to be subsequently directed should be made.

When was this division to be made? I think it is plain, from the whole scope of the will, it was to be after the death or marriage of his wife, if either of these events should occur after Rachel attained full age; but if before, then not until Rachel's majority; for immediately after the clause which speaks of the "*dividend,*" the testator proceeds: "*And farther, it is my will that my fulling-mill be at the discretion of my wife and unmarried daughters, to let it to such person or persons as they see fit, toward their mutual support and that of my minor sons as aforesaid, until the death of my wife or marriage.* But in case *the death or marriage* of my wife should take place before my daughter Rachel arrives at the age of twenty-one years, in that case my will is that my property remain to be occupied by my unmar-

ried daughters, for their mutual support until that period." Thus far the primary object is plainly apparent. It is to make provision for his wife as long as she might need it, or until she united herself again in marriage, and for the unmarried daughters during their minority. It is either the death or marriage of the wife that is to put an end to her estate, and the attainment of full age by Rachel, that is to determine the exclusive interest of the unmarried daughters. It was not the marriage alone, but the death or marriage, whichever should first happen, that was to create new interests, for then the unmarried daughters, if Rachel was still a minor, were to have the estate till her full age; and if then, to wit, at the *period of the death or marriage*, Rachel should be adult, or whenever she became so, a farther immediate disposition was contemplated, which disposition we will presently see could be nothing else than the "dividend" mentioned in the prior part of the will, as to be therein-after mentioned.

The first succeeding disposition which he makes, is in favour of the wife, in the event of her marriage. She is to draw from the estate, when divided, an equal share with the children. Then follows the clause which gives birth to this controversy. "And farther, it is my will and I do order, that after the marriage, if that should take place, of my wife, and at or after my daughter Rachel arrives to the age of twenty-one years, that my executors hereinafter named, dispose of the whole of my personal and real estate at public sale, and of the proceeds after deducting necessary expenses, to be equally divided to and among my wife in case of her marriage as aforesaid, and each of my children, share and share alike, except my son James Graham, *which* I give and bequeath the sum of one dollar, lawful money, to be paid out of my real and personal estate, and *no more.*"

Now although the death of the wife is not expressly mentioned in this clause, as determining her several estate and constituting a period when the land was to be sold and divided, we cannot close our minds against the conviction, that the testator had in view the same contingencies for which he had provided before, and that the proper words were inadvertently omitted. Looking to the whole will and to the events contemplated by the decedent, it is impossible to believe that he intended the dis-

herison of James to depend on the contingency of his wife marrying again—that in case an event happened over which he could have no control, and which therefore could not affect his merits in the eyes of the testator, or his claim on his bounty, he was to be cut off with a dollar, while if the widow died without marrying, he was to come in for an equal share with the other children—in other words, that in the one case the testator intended to die testate, and in the other, intestate. This cannot be. The intention to exclude James is apparent, and the language of the clause under consideration is emphatic. He shall have of my estate the sum of one dollar and *no more*. It is true, that these words standing alone, would not operate to disinherit him without some actual disposition of the estate, express or by implication, but in a case of doubtful intention, they afford a strong light to conduct to correct conclusions. This construction is strengthened by the clause immediately following and in continuation of that last quoted from the body of the will—"which legacies I give and bequeath unto each of them or the survivors of them, or to their lawfully begotten heirs and assigns forever." What legacies? Why, the proceeds of the real estate he had given directions to be sold. "Unto each of them." Who are they? Why doubtless, his wife, in the event of her marriage, and children, or in the event of her death before marriage, his children, all of whom were to share equally of the proceeds, except James, who was to have one dollar and no more. Can there be stronger evidence than this, of the deviser's intention that his estate should be finally settled and disposed of in the shares and proportions he had just before pointed out?

The argument drawn in favour of an opposite intention, from the bequest in the codicil to the widow, of one hundred dollars more and in addition to what was theretofore bequeathed to her, is answered by the fact that this legacy was, obviously, intended to be in addition to the child's share given her by the will, and to take effect only in the event of her again marrying. Taking then, into consideration the introductory words, and the several clauses of the will brought into notice, I am of opinion that there is such a strong probability of the intention of the testator to die testate, and, by his will, to exclude James from an equal participation with the other children, that a contrary intent cannot be supposed; and there being in this will a sufficient designation

of the persons who are to take the estate, we will, to prevent a failure of the devise, supply by implication the words "or death," which I cannot but think, by fair inference from the whole will, were inadvertently omitted in the clause directing a sale by the executors—so as to make it read, "at or after the marriage, if that should take place, *or* death of my wife," &c. The whole will, will then be made congruous and all its parts stand together.

If this construction be the correct one, it follows that James Graham the complainant, has no interest in the property in question, under the intestate laws of the commonwealth.

The prayer of his petition for a distribution according to the intestate laws, cannot therefore be granted. *Wherefore the citation is dismissed.*

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IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF LANCASTER.

[March 3, 1845.]

DAVIS *v.* M'CORMICK.

1. As the writ of *capias* since the act of 1836, relating to the commencement of actions, cannot legally issue without a previous affidavit, such as that act requires, if issued without an affidavit, it may be set aside or quashed, on motion to the court by the party arrested.
2. A motion to quash, is in such a case, the proper remedy.

Capias in case *sur libel*, to September term, 1844, No. 52. Bail in \$2000: C. C. & B. B. September 2, 1844, rule to show cause why the defendant shall not be discharged on common bail. September 9, 1844, rule to show cause why the writ shall not be quashed. Argued February 17, 1845.

HAYES, president. The writ in this case was issued without any affidavit. Our rule of court, No. 3, under the head of bail, declares that no bail shall be required in actions of trespass *vie et armis*, in actions of libel, in actions for slanderous words, conspiracy, false imprisonment, or malicious prosecution, unless a previous affidavit of the cause of action be made and filed, before issuing of the writ. The breach of this rule in the present case, might be satisfied by ordering the bailbond to be canceled, and the defendants to be discharged on common bail.

But the act of 1836, relating to the commencement of actions, provides in section 4, That no writ of *capias ad respondendum*

shall issue in any case, unless the plaintiff, his agent or attorney, shall previously thereto, make affidavit setting forth, first, the cause of action, &c. And the commissioners in their report of the bill which was enacted into this law, after discussing at large the existing practice and modes of proceeding in commencing actions, under the act of 1724-5, say, that they propose in the reported bill, to limit the methods of commencing personal actions to two, namely, summons and *capias* with bail; which they think adequate for all purposes with the exception they have stated, *i. e.* in cases wherein a *scire facias* or other particular writ is allowed.

"We propose farther," they add, "that the writ of summons, shall be the general method of commencing actions, and that a *capias ad respondendum* for the arrest of the person, shall be allowed only in certain special cases, which are distinctly set forth in the bill. We have endeavoured to lay down a plain and consistent rule for the guidance of practitioners, and the information of the community; and at the same time, to settle in a satisfactory manner the different questions concerning compulsory process." To carry out their plan, the bill reported by them, provided, as now in the fourth section of the act, that no writ of *capias ad satisfaciendum* should issue in any case, unless the plaintiff, his agent or attorney, should previously thereto, make affidavit setting forth, &c., &c. So that without this prerequisite, no writ of *capias ad respondendum* or *capias ad satisfaciendum*, can issue to arrest any defendant since the act of 1836. All persons are otherwise privileged from arrest. But if a *capias* be issued against one privileged from arrest, it will be quashed on motion. 3 Mass. 193; 2 Mass. 511.

This writ has been issued in direct contravention of the act of assembly. The motion to quash is the proper remedy for such a violation of the law, the writ of *capias* being issued by the prothonotary, under the direction of the party and without any application to the court. The defendant irregularly arrested, is entitled therefore to make his appeal to the court, to relieve him from the exigency of such illegal process by setting it aside, *quia improvidé emanavit*.

I am of opinion then, that according to the provisions of the act of the 16th June, 1836, relating to the commencement of actions, the writ of *capias* in this case, having been issued without any previous affidavit, is illegal, and must be quashed.

IN THE SUPREME COURT OF PENNSYLVANIA.
NISI PRIUS.

[Philadelphia, October 11, 1845.]

MONTELIUS V. MONTELIUS.

1. Judgment was entered on a bond and warrant of attorney, which stipulated that execution should not issue before default in the payment of several promissory notes, *unless* the partnership existing between defendant and A. B. should be dissolved: Held, that an execution issued before the maturity of the notes, without a *scire facias* having been first sued out, to ascertain whether the partnership had been dissolved, was irregular, and it was accordingly set aside.
2. It is no objection to the validity of a judgment entered under the 28th section of act of 24th February, 1806, that no declaration was filed, although the warrant of attorney required that one shall be filed.
3. A warrant of attorney to enter judgment of the last, next, or any subsequent term, authorizes the entry of a judgment at the present term.
4. As between the plaintiff and defendant, it is no objection to the validity of a judgment, that the prothonotary has not fully complied with the act of 24th of February, 1806, which requires him to enter on his docket the date and tenor of the instrument of writing on which the judgment is founded.

This case arose on a rule to show cause why a judgment entered on a bond and warrant of attorney, and the execution issued thereon, should not be set aside. The decision requires that the bond and warrant should be given at length as follows:

"Know all men by these presents, That I, Marcus Montelius, tobacco-nist of the city of Philadelphia, am held and firmly bound unto William Montelius the elder, merchant of the said city, in the sum of \$6000 of good and lawful money of the United States, to be paid to the said William Montelius sen., or his certain attorney, executors, administrators or assigns, to which payment well and truly to be made and done, I do bind myself, my heirs, executors, administrators and assigns, and every of them, firmly by these presents. Sealed with my seal, dated the 6th day of December, A. D. 1844.

"The condition of the above obligation is such, that whereas the above bounden Marcus Montelius hath this day given to the said William Montelius sen., his promissory notes, for the payment in all of \$3000 as follows, to wit: One for \$500, dated December 6, 1844, payable 18 months after date. One note for \$500, dated as above, payable two years after date. One note for \$500, dated as above, payable two years and six

months after date. One note for \$500, dated as above, payable three years after date. One note for \$500, dated as above, payable three years and six months after date. And one note for \$500, dated as above, and payable four years after date.

"Now, if the above bound Marcus Montelius, his heirs, executors, administrators or any of them, shall and do well and truly pay or cause to be paid unto the above named William Montelius sen., his heirs, executors, administrators or assigns, the just and full sum of \$3000, at the times and in the amounts above set forth, with legal interest for the same, without fraud or farther delay, then this obligation to be void and of none effect, or else to be and remain in full force and virtue.

"And farther, I the said Marcus Montelius do hereby empower any attorney of any of the courts of record of this state or elsewhere, to appear for me, and after one or more declarations filed for the above penalty, thereupon to confess judgment or judgments against me as one of the last, next, or any subsequent term, with release of errors, under the condition and with the distinct understanding however, that no execution shall issue, and no proceedings whatever be had upon said judgment or judgments, saving and excepting one or any of the following named counts or occurrences should take place: First, that any one of the said notes shall have become due and remain unpaid; secondly, that the partnership now existing between the said Marcus and William Montelius jun., shall have been dissolved; thirdly, that any judgment for any amount exceeding \$200 shall have been entered upon the records of any court of this commonwealth against me the said Marcus; and fourthly, upon my decease. In case any one of the above mentioned contingencies or events shall have taken place, then the said judgment or judgments to take effect, otherwise no proceedings to be had thereon.

"In witness whereof, I have hereunto set my hand and seal this 6th December, 1844.

MARCUS MONTELIUS, [Seal.]"

Witnesses.—Robert T. Conrad, William Montelius jr.

On the 13th December, 1844, judgment was entered upon the foregoing bond, but without any appearance being marked for either party, or declaration filed.

The prothonotary entered upon his docket the names of the parties, the date of the bond, its penal sum, and the dates and amounts of the several promissory notes, but not the terms of the stay of execution.

On the 3d of October, 1845, the plaintiff issued a *fi. fa.* under which the sheriff levied upon and took possession of the stock in trade belonging to the defendant, at his store, No. 356 Market street.

On the 6th of October, 1845, a rule was obtained to show cause why the judgment and execution should not be set aside, returnable October 11, 1845.

Before the return of the rule the plaintiff took deposition to prove that the partnership between Marcus Montelius and William Montelius jr., had been dissolved by consent, before the execution was issued.

Counsel for the defendant, *David Webster* and *C. Wallace Brooke*; for the plaintiff, *Charles E. Lex* and *H. J. Williams*.

Webster for defendant, argued, that the judgment had not been entered in accordance with the terms of the warrant, in the following particulars: First, no declaration was filed; it was expressly required that one should be filed before entering judgment, and as a warrant of attorney is in the nature of a contract, its terms are to be strictly followed. Second, no authority was given by the warrant to enter the judgment at the December term. It read, "to confess judgment against me as of the *last, next, or any subsequent term*," thereby excluding authority to enter judgment at the then *present* term. A warrant to appear and confess judgment of a particular term must be entered of that term, and cannot be entered of any other. Bing. on Judgments 44; 2 Ch. Arch. Pr. 679. Third, the prothonotary in entering the judgment, had not complied with the act of 24th February, 1806 (Purd. Dig. 243), which requires him "*particularly* to enter on his docket the *date and tenor* of the instrument of writing on which the judgment is founded." The prothonotary had not entered on his docket the special agreement for the stay of execution, which was an essential part of the warrant, and of great consequence to the defendant: certainly a part of the *tenor* of the instrument. *Helvete v. Rapp*, 7 S. & R. 306.

As to the execution, it was a conclusive objection to it, that

it had been issued without a *scire facias* having been first sued out, or any suggestion put upon the record of the happening of any of the contingencies named in the warrant, or without leave of the court. The docket showed that none of the notes had matured; and it did not show the happening of any event which would entitle the plaintiff to execution. It must first appear that the defendant has made default, which could not be properly done except by a *scire facias*. The cases showed such a step to be necessary. *Holden v. Ball*, 1 Penn. Rep. 460; *Adams v. Bush*, 5 Watts 289. It was true, the plaintiff had taken depositions to prove the dissolution of the partnership, but it was sufficient for the defendant to deny that fact, and to ask the court to direct an issue to be formed to decide the question, or else require the plaintiff to sue out a *scire facias*.

Williams & Lex for plaintiff, argued that the entry by the prothonotary of judgment, without filing a narr. was good, although the warrant only authorized such an entry after declaration filed;—they relied on 28th section of act of February 24, 1806; *Helvete v. Rapp*, 7 S. & R. 306; *Com. v. Conard*, 1 R. 249;—that an execution might be issued without a *sci. fa.* or notice to defendant, and without first obtaining leave of the court—and that upon the happening of either of the events specified in the condition of the bond, the whole of the amount intended to be secured, became due. *Gorman v. Richardson*, 6 S. & R. 163; *Smith v. James*, 1 Miles 162; *Morrell v. Smith*, 5 Cowen 441.

Brooke in reply, adverted to the fact that this rule was obtained at the instance of the defendant, and not upon the application of a creditor, as appeared to be the case in several of the authorities cited on the other side. He remarked, that judgments were frequently sustained between creditors, which would be held to be void in a contest between the parties. In *Helvete v. Rapp*, the defence was taken by a judgment creditor. The terms of the warrant are omitted in the report, but it is not alleged in any part of the case, that the docket entry did not set forth particularly the “date and tenor” of the bond. The question presented was, whether, notwithstanding all the particulars were spread upon the docket, the omission of the prothonotary to state, in words, that *judgment was entered*, rendered the entry nugatory. This case does not bear any analogy to the present. *The Commonwealth v. Conard*, was an action against

the prothonotary for an alleged breach of duty in omitting to enter on his docket the stay of execution provided for in the warrant of attorney, and the question was whether, under the circumstances, in the absence of particular instructions, the prothonotary acted in bad faith. Neither of these authorities touch the positions taken by the defendant. The cases cited in support of those positions, clearly show that the entry of this judgment is not in accordance with the warrant, nor in pursuance of the act of assembly; and it is therefore void.

But even if the judgment was regularly entered, the execution cannot stand. It is alleged that one of the contingencies mentioned in the warrant has arisen, to wit, the dissolution of the partnership. What constitutes a dissolution may be a question, and upon that point the defendant has a right to be heard before a tribunal competent to determine the fact. The establishment of this fact is necessary to entitle the plaintiff to issue the execution. He cannot assume it, and call upon the defendant to disprove it. He must show affirmatively that the event has happened. And for this purpose a *scire facias* should have been issued. *Gorman v. Richardson* has been relied upon as a case in point to show that a *sci. fa.* was unnecessary. The facts in some respects are similar, but in that case there was an explicit admission, upon the record, by the defendant's attorney, at the time of confessing the judgment, that the partnership was dissolved. This rendered a *scire facias* useless. The other cases cited by the plaintiff's counsel belong to a peculiar class, and are easily distinguishable from the present.

His honour, judge Sergeant (after consulting with Mr. justice Kennedy, who came into court at the close of the argument), pronounced his decision as follows.

SERGEANT J. The first objection which has been taken to the judgment, is that it was entered without a declaration having been filed, according to the terms of the warrant which is of an anomalous character, as it and the bond are incorporated together, and form in fact but one instrument. But I think that a strict compliance with such a clause in a warrant of attorney accompanying a bond, has been dispensed with by the act of 24th February, 1806. The 28th section of that act requires the prothonotary of any court of record within this commonwealth,

on the application of any person being the holder of any instrument of writing containing a warrant to any attorney at law to confess judgment, to enter the judgment without the agency of an attorney, or *declaration filed*. This section seems to control the language contained in the warrant of attorney in this case. It is next urged that the judgment has been entered of the wrong term. It appears to me, however, that the expression, *last term*, in a warrant, includes the term of the execution of the bond and warrant, as the words are referable to the commencement of the existing or present term. It is also contended that the omission of the prothonotary to transcribe on the docket the terms of the agreement for stay of execution, avoids the entry of the judgment. Such an objection might, as in the cases cited in support of this point, be of consequence between the plaintiff and the prothonotary, or between the plaintiff and the sheriff, but it is a matter of no importance as between the plaintiff and defendant, on a question as to the validity of the judgment. These are the grounds upon which the rule has been taken to set aside the judgment, but I do not think they are sufficient.

The objection to the execution is, that the plaintiff did not first issue a *scire facias* calling upon the defendant to show cause why the plaintiff should not have execution of his judgment, because of the happening of one of the contingencies specified in the warrant, other than the non-payment of the several notes. I am inclined to think that the plaintiff was bound to follow this course. The issuing of a *scire facias* is the most direct and appropriate method to ascertain whether the terms upon which execution was to stay, have been violated by the defendant, or whether any of the contingencies upon which it was to issue have ever happened. Here the plaintiff alleges that although none of the notes have matured, yet the partnership between the defendant and William Montelius jr., has been dissolved, which if true, would give the plaintiff a right to issue an execution. But this is denied by the defendant. Can the court decide between the parties? A partnership may be dissolved in a variety of ways, but only on a certain state of facts which must be established before a jury, and not assumed by the court. Upon the whole, I am of opinion that the *scire facias* must be issued, as the case is somewhat like that of *Adams v. Bush*, 5 Watts 289, where this court seems to have decided the point.

Execution set aside.

IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF LANCASTER.

[May 2, 1845.]

NORTHAMPTON BANK FOR THE USE OF GIBBONS *v.* WINDER.

1. Where there are several issues in fact upon several counts in a declaration, and a verdict passes for the plaintiff on any one of the issues, he is entitled to a general judgment for costs, and the defendant is not entitled to judgment on the counts determined in his favour, but the court may direct the prothonotary to strike out of the plaintiff's bill all costs not applicable to the count upon which he recovered.

This was an action of trespass on the case. The declaration contained two counts. On the first, charging the defendant with fraudulently obtaining from John Rice, certain funds, notes and securities to the amount of \$108,500, belonging to the Northampton Bank, the verdict was rendered in favour of the defendant. On the second count, charging trover and conversion of the same articles, the verdict was rendered in favour of the plaintiff, assessing the damages at \$2456 21½.

The defendant by his counsel, moved that judgment be entered in favour of the defendant on the first count for his costs.

LEWIS, president. The cases cited in favour of the motion which has been made in this case are, *Day v. Hanks*, 3 T. R. 654; *Griffith v. Davis*, 8 T. R. 466; *Martin v. Wallace*, 1 East 350; and *Braithwait v. Bradford*, 6 T. R. 602. In the first case cited, the *only issue* tried was found for the defendant. In the second, there were several issues, and *all* of them were found for the defendant. In the third case, the only issue tried was found for the defendant, and that was on a plea of justification, which went to the whole declaration, and showed that the defendant was entitled to a general judgment. In these cases where the defendant obtained verdicts in all the issues in fact which were tried, the court on account of the hardship of the case, decided that he was entitled to recover his costs. In *Braithwait v. Bradford*, 6 T. R. 602, a similar determination was made, founded upon the special language of the enclosure act, under which the issues were formed; but the court at the same time recognised the existence of the rule as one too long established to be disturbed, that where there are several issues in fact upon several counts in the declaration, and a verdict passes for the plaintiff on any one of the issues, he is entitled to

the general judgment for the costs, and the defendant is not entitled to judgment on the counts determined in his favour. This principle is stated in 2 Tidd's Prac. 888; 2 Archbold's Prac. 286; and is fully established by numerous cases, among which are *Spicer v. Teasdale*, 2 B. & P. 49; *Brydges v. Raymond*, 2 Bl. 800; *Ibid.* 1199; *Portman v. Stairway*, 5 East 265; *Astley v. Young*, 2 Burr 1232; *Butcher v. Green*, Douglass 676; *Dalby v. Hirst*, 1 Broderip & Bingham 224.

The case of *Butcher v. Green*, Douglass 677, was a case very similar to the present; the action was trespass on the case. There was a count in *slander*, and a count in *trover*. The defendant obtained a verdict on the count first mentioned, and the plaintiff had a verdict on the count for *trover*. The causes of action were necessarily different in *substance*, as well as in *form*; and nevertheless the plaintiff had judgment for the costs, Buller j. stating that the practice had been uniform not to allow the defendant costs in cases of this sort. The rule seems to be founded upon the doctrine, that no costs are allowed to either party at common law, and that there is no statute making provision for a defendant who only succeeds in defeating a part of the plaintiff's action. The case of *Mans v. Mans*, 10 Watts 87, was determined upon this principle in a matter of peculiar hardship. Several persons who were entire strangers to a judgment, were served with a *scire facias*, and called upon to show cause why the lands which they respectively occupied as terre-tenants, should not be taken in execution in satisfaction of the debt. They succeeded in obtaining a verdict, each upon grounds peculiar to himself, but were not allowed costs, because the plaintiff had obtained a verdict against the representative of the debtor, and against others who were also sued as terre-tenants. If defendants who were in no manner chargeable, against whom the plaintiff had no cause of action whatever, and who succeeded in establishing a complete defence, were not, under such circumstances allowed costs, such allowance ought not to be made in favour of a defendant who is found chargeable with converting to his own use, a portion of the identical property with which he was charged in another form, in the count upon which he obtained a verdict. The cause of action was in both counts substantially, although not technically the same, and each complained of an injury to the plaintiff in respect to the

same property. The rule however, has been long settled, and nothing short of judicial legislation can change it.

For a long period of time there was a practice in the English common pleas, to allow the plaintiff to recover in such cases the costs of those witnesses which were exclusively applicable to the count upon which he failed to obtain a verdict. By the practice of the king's bench a different rule prevailed, more consonant to reason and justice. In 1799, Buller j. mentioned in the case of *Spicer v. Teasdale*, the unreasonableness of the practice of the common pleas in this respect, and that the court had intimated an intention of changing it, but it had not then been done. Afterwards however, the practice was made to conform to the course of the king's bench, as appears by a report of the prothonotary in 1819, in the case of *Dalby v. Hirst*, 1 Brod. & Bing. 224. In conformity with these principles, the prothonotary is directed to strike out of the plaintiff's bill, all costs not properly applicable to the count upon which he recovered. This, as a controlling principle in the taxation of costs, will be beneficial to the defendant, where the causes of action in the different counts are essentially different; but, it is presumed, will make but slight change in the amount of the bill, where as in this case, the causes of complaint are in respect to the same property in both counts, and where under the count on which the plaintiff recovered, all or nearly all his evidence might have been given, and was properly applicable.

Let the rule be discharged.

Messrs. Gibbons and King of Lehigh county, and *Mr. Franklin* of Lancaster, for plaintiff.

Messrs. Meredith and Ingraham of Philadelphia, and *Mr. Stevens* of Lancaster, for defendant.

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IN THE DISTRICT COURT OF PHILADELPHIA.

ERB V. LANDIS.

1. A garnishee in an action of foreign attachment may take a rule on the plaintiff to show his cause of action.

Rules had been obtained on the 20th of September, 1845, by *Mr. Perkins* in the above case, on the plaintiff, to show his cause of action, and why the attachment should not be dissolved.

Before the hearing of the above rules, *C. Ingersoll*, for plaintiff, obtained a rule on *Mr. Perkins* to file his warrant of attorney.

And on the 13th of December, *Mr. Perkins* filed a warrant of attorney to himself from the garnishee.

It was objected that this was not sufficient; but the court decided otherwise.

[December 1, 1845.]

BOWEN ET AL. V. BURDICK.

1. Where a debt has been contracted fraudulently, the plaintiff may bring either an action in form *ex delicto*, or an action on the contract; but he cannot by his election deprive the defendant of any substantial privilege or defence. Therefore, since the act of 12th July, 1842, an action in form *ex delicto* cannot be commenced by a writ of *capias*, for a debt contracted fraudulently.

This was a rule to show cause of action, and why the defendant should not be discharged on common bail.

The affidavit set forth in substance, that the defendant had obtained goods and merchandise, enumerated in a schedule annexed, to the value of \$ 1754 76, from the plaintiff, by means of representations of his capital and expectations, which the affiant averred to be false and fraudulent, and that the contract of sale, if any ever was made, had been rescinded, and due notice thereof given to the defendant.

Mr. H. M. Phillips, for the rule. *Mr. John Fallon*, contra.

SHARSWOOD J. The act of July 12, 1842, "To abolish imprisonment for debt and to punish fraudulent debtors," provides, that no person shall be arrested on any civil process for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or

implied, or for the recovery of any damages for the non-performance of *any contract*. It is clear from these words, that the form of the action was not meant to be the guide in the determination of cases arising under this act. If it were necessary to go farther to seek the intention of the legislature, the exception in the 1st section, of cases of "misconduct or neglect in office or in any professional employment," and the clause in the 3d section, by which the remedy by warrant of arrest is provided where the defendant "fraudulently contracted the debt or incurred the obligation respecting which suit is brought," would be conclusive.

Fraud vitiates every thing it touches; and no case can well be imagined of a fraudulent contract in which the party injured has not his election to repudiate the contract, and pursue his remedy in an action in form *ex delicto*. If it be a sale of goods he may bring trover, and in that or any other contract, an action on the case for deceit. Where there has been misconduct or neglect in any professional employment, the plaintiff may declare upon the contract express or implied in assumpsit; or lay his gravamen in the breach of duty of the defendant in an action on the case. (1 Chitty's Pl. 92; ib. 138.) And this is not confined to the case of attorneys or physicians, which no doubt was immediately in the mind of the legislature when they made misconduct or negligence in any professional employment an exception to the general provisions of the act, but the same principle is applied to many other cases. Thus bailees generally, having the use or care of personal property, may be proceeded against either in assumpsit or case, at the election of the party. Where the plaintiff declared against three, that they had the loading of a hogshead of the plaintiff, for a certain reward to be paid, and that they so negligently conducted themselves in the loading that the hogshead was damaged, it was held, that on the plea of not guilty two of the defendants having been acquitted, judgment might be entered against the third, who was found guilty. *Govett v. Radnidge et al.*, 6 East 62. Where a count stated that the plaintiff had delivered a note to the defendant to get it discounted, and account with the plaintiff for the money raised on it, and that the defendant received the note for that purpose, but intending to defraud the plaintiff, had not, though requested, accounted

with him, it was held that it was laid in tort, and that a count for trover might be joined. *Samuel v. Judin*, 6 East 333. It is necessarily implied then, when "misconduct or negligence in any professional employment" is expressly excepted, that other cases of misconduct or negligence in the performance of a duty imposed by contract are within the act, without regard to the form of action which may be adopted.

It is the settled law of Pennsylvania, that the election of the plaintiff in cases of this character to proceed in an action in form *ex delicto*, shall not deprive the defendant of any substantial privilege or defence. Thus, where an infant hires a horse to go to one place, but goes to another, and kills the animal by severe usage, he may plead his infancy in bar of an action on the case for damages. *Penrose v. Curren*, 3 Rawle 351. And where the facts were the same but the action was trover, it was decided that whenever the substantial ground of an action against an infant is contract, as well where the contract is stated as inducement as where it is not, the plaintiff cannot recover. *Wilt v. Welsh*, 6 Watts 9; see *Curtin v. Patton*, 11 S. & R. 310. In these cases the authority of *Johnson v. Pye*, 1 Keb. 905, 913; 1 Lev. 169, was cited and relied on, where an action on the case was brought against an infant, for a false and fraudulent misrepresentation in a contract made by him, and it was held that he was not liable, because the action was founded on the very contract in which the defendant had cheated the plaintiff.

The act of assembly meant that the privilege from arrest or imprisonment, upon the mere *ex parte* affidavit of the plaintiff or other person for him, should exist in all cases arising from contract express or implied, where the plaintiff may in fact have given credit to the defendant, with some exceptions expressed; and it is in conformity with the spirit of the cases which have been cited, to hold that the election of the plaintiff of his form of action shall not deprive the defendant of the privilege thus secured to him by the law. We feel the more confidence in this decision, as the same view appears to have been taken by the supreme court of New York in the construction of their statute, from which our act of assembly has been almost literally copied. *Brown v. Treat*, 1 Hill 225.

We do not mean however to express any opinion in regard to final process, and therefore do not deem it necessary to advert

to the case of *Tryon v. Hassinger*, 2 Penn. Law J. 43. It may present a somewhat different question, inasmuch as the defendant in that case will have had an opportunity of controverting the allegation of fraud on the trial, and the provision in the 3d section, of a warrant of arrest for a debt fraudulently contracted, seems confined in its terms to the case of a pending suit, and not of a judgment. And of course it is scarcely necessary to add, that this decision does not apply where the defendant has fraudulently represented some third person as fit to be trusted, or any other deceit where there has been no contract between the parties, and where case therefore is the only remedy.

Rule absolute.

[December 11, 1845.]

JANNEY v. HARLAN.

1. The lien of registered taxes in the city and county of Philadelphia, under the act of February 3, 1824, is divested by a judicial sale.

On a case stated, the following question arose for the decision of the court: whether the lien of taxes registered in the office of the county commissioners, remained a lien after a sheriff's sale of the premises against which they were charged.

St. George T. Campbell, for plaintiff—(that the lien was divested), cited *Spring Garden v. Weaver*, S. C. 1845, MS.

Mr. Gerhard, for defendant, cited *Willard v. Norris*, 2 Rawle 56; *Corporation v. Wallace*, 3 Rawle 109; *Simmons v. Whartenby*, 4 Penn. Law Jour. 226; *Lace v. Snively*, 4 Watts 396.

The opinion of the court was delivered by

SHARSWOOD J. In the other counties of the commonwealth, taxes assessed for county and other municipal purposes are not a lien upon real estate; nor were they in this county prior to the act of February 3, 1824 (Purd. 212), which was passed perhaps in consequence of the decision of the supreme court in *Burd v. Ramsay*, 9 S. & R. 109.

In the 1st section of that act, declaring them to be a lien in the city and county of Philadelphia, the only words which invest them with any special quality or distinguish them from any other general lien indefinite in duration, are those which declare that they "shall have priority, and be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation, or responsibility, which the said real estate may be-

come charged with or liable to, from and after the passing of this act." To provide simply that a claim shall be a lien, is to subject it to all the legal incidents which belong to that kind of security, and no more: and one of the incidents of such a lien in this state is, that it is liable to be divested by a judicial sale. The rank which it may hold in the order of payment is entirely immaterial. When this law passed all liens were divested, and though the order of time was not observed as to all of them, yet that produced no difference. The lien of taxes then first created was certain in its amount and character, and though invested with a legal precedence over all others, fell within no recognised exception to the general rule.

It has been contended indeed, and it must be admitted with considerable plausibility, that inasmuch as it is expressly enacted that taxes shall be fully paid and satisfied before any mortgage, and by the subsequent acts of April 6, 1830, and April 11, 1835 (Purd. 428, 429), the lien of mortgages is saved from the effects of a judicial sale, even though there should be unpaid and unsatisfied taxes on the property, a construction of all these acts as in *pari materia*, and forming one system, requires that the same inviolability should be attached to them, at least in the case where the premises are sold subject to a mortgage or mortgages. It is urged that great inconvenience and sometimes injustice to the public, would result from a contrary doctrine; and the symmetry of our jurisprudence upon this subject impaired. It is certainly true, that a first mortgagee by procuring a sale under a younger incumbrance, and of course subject to his mortgage, may in this way improve his security. Indeed if he purchases it himself, as he may often be able to do at a nominal sum, the county or municipal corporation to whom the tax is due, may entirely lose all claim on the estate, and he in consequence be proportionably benefited. But these results are a consequence of the interposition of the legislature in introducing by the act of 1830 an exception to the general rule before judicially established; and if in the measure adopted to secure a particular purpose an oversight was committed, and the general harmony of the system disturbed, it is no uncommon occurrence in such cases. The legislature must be appealed to, to apply the remedy. When they interfered to preserve the lien of a mortgage though preceded by taxes, not having declared that they also shall be

saved, it is not the right of the judiciary upon the mere conjecture that such was their will, or even upon the opinion that it ought to have been their will, to interpolate such a provision in the statute. A mechanic's lien, under our acts of assembly, is expressly preferred to any lien attaching subsequently to the commencement of the building, and if the legislature should see fit to enact that the existence of that or any other prior incumbrance should not operate to make a judicial sale divest a mortgage, however monstrous the injustice which such a law would produce, it would not be in the power of the courts to prevent it. Indeed the proviso of the 4th section of the act of 16th April, 1845 (Pamph. L. 489), shows that the legislature has not yielded to the force of the suggestions of inconvenience and inconsistency which have been referred to: for by that act, in which they have extended the provisions of that of 1835 by the more general and sweeping words, "any tax, charge, or assessment whatsoever," they have expressly provided that the continuance of the lien of a mortgage shall not prevent the discharge of such prior liens for taxes, charges, and assessments, by a judicial sale, or the satisfaction thereof out of the proceeds of such sale.

It is true that this construction of the acts of assembly will render it more necessary than ever, that public officers intrusted with the duty of collecting the taxes should be vigilant; and that the sheriff should in all cases make the necessary searches for registered taxes, and give notice to the collector of the ward or township in which the property is situated. But this will evidently redound to the advantage of the public, though it may occasion trouble to the officer. A more substantial objection is, that county commissioners and collectors have no power to secure the interest confided to them by bidding at the sale on behalf of the county. That, however, as the tax is a lien prior to all others, and is upon ground rent as well as ground, would in practice be productive of loss only in the case before adverted to, of a sale of property subject to a mortgage equal to or beyond its market value; a case which clearly calls for some legislative remedy, but ought not to prevent a decision which in its general effects upon security of title and confidence in judicial sales, cannot fail to be highly beneficial.

Judgment for the plaintiff.

IN THE COURT OF QUARTER SESSIONS FOR THE
CITY AND COUNTY OF PHILADELPHIA.

COMMONWEALTH V. KENSEY.

1. An indictment for *forcible* entry may be sustained against a landlord for *forcibly* ejecting a sub-tenant after the termination of the tenancy and removal of the principal tenant, although the landlord might not be liable for damages to the sub-tenant for injuries done to goods in removing them.
2. An indictment cannot be sustained which charges defendant with forcible entry on the possession of a *married* woman whose husband is living.

PARSONS J. This case is now presented before us on a motion for a new trial, on account of a misdirection upon the law by the court. The state of the case is this: the defendants were indicted for a forcible entry and detainer. On the trial it appeared that William Kensey had leased a house in this county to a tenant for one year, and that this tenant rented one room of the house to Jane Dewees, the prosecutrix, as an under tenant. A few days before the 1st of April, the tenant left the other part of the house, and Jane continued in the possession of the room. On the 1st of April, Kensey, the landlord, came and requested her to leave the premises, which she declined doing, upon the ground that she had no place to go to; he then threatened to dispossess her immediately, and she refused to leave that day. After he left the house, she locked the door leading into the room. He then went and called the other defendants, who were his workmen, and tore some boards off the folding-doors, that had been placed on the outer side of the apartment occupied by Jane before or at the time she removed into the house, and by that means effected an entrance into the room which she occupied, and forcibly took her and her furniture out of the house, she resisting all the time by the use or threatened application of scalding water, when as she testified her expulsion was effected by the superior force of five men.

The counsel for the defendants requested the court to instruct the jury, that if they believed the defendant was the landlord of the premises and the lease had terminated, he was entitled to the possession of the premises, and if the tenant or sub-tenant was holding over, the defendant had a right to enter and forcibly remove the prosecutrix, and if she resisted that he was justified in what he did; therefore they could not find him guilty of the

offence charged. This instruction the court declined giving to the jury, but instructed them that if they believed the prosecutrix was in the peaceable possession of the premises, and that the defendants entered by force and with a strong hand removed her from the same, or used such force as would put her life or person in jeopardy, by standing in the defence of her possession, they were guilty of the offence charged in the indictment; and that Kensey being the landlord and entitled to the possession, formed no defence, if he had been guilty of a breach of the peace; nor would the relationship of landlord and tenant justify him in resorting to physical force in order to regain the possession.

The counsel for the defendants also requested the court to instruct the jury, that a forcible entry could not be committed against the possession of a married woman while her husband was in being. This instruction the court refused to give, but charged the jury that if they believed Jane Dewees was living alone, and her husband was absent at sea, and she was in the sole and peaceable possession of the premises, it was a breach of the peace violently to remove her from the possession, and the averment in the bill that she was in the possession, and that the offence was committed against that possession, was good. It is in consequence of this alleged misdirection on these two points of law, that the counsel for the defendants ask for a new trial.

The defendant's counsel seek to sustain their first position upon the authority of *Overdeer v. Lewis, 1 Watts & Serg. 90*, and allege that the principle laid down in that case must rule the present in favour of their client. But it appears to me it does not, and that it would be a misapplication of the principle there decided to say, that it should govern in a prosecution for forcible entry. For a proper understanding of the doctrine there advanced, we must consider the facts of the case to which it was applied.

Sometime after the expiration of the lease, the landlord ordered the tenant to quit immediately the front room of the house, which he then occupied as a store; this he declined to do immediately, but offered to do so the next day. The landlord insisted that he should go immediately, and commenced removing the goods of the tenant, and in doing so broke and

injured some of them, and the action was brought for the injury to the property by the removal. The court below charged the jury, that the landlord was not liable for the damages occasioned by the removal, but only for unnecessary violence or injury to his property. The supreme court sustain the judgment of the court below. But it must be borne in mind that there was no *forcible entry*; on the contrary, it would seem the entry of the landlord was peaceable, and having thus entered, he removed the property because he was entitled to the possession. And I presume that the court go upon the ground, that having obtained a peaceable entry and being legally entitled to the possession, he might retain it, and consequently reject intruders or remove the property of one who had no legal right to place it there. But it has never yet been decided in Pennsylvania, that a landlord or any one else could commit a breach of the peace to regain his possession, although legally entitled to it. On the contrary, the act of 1700, against forcible entry, makes such conduct an offence. It says: "Whosoever shall violently or forcibly enter into the house or possession of any other person within this province, being duly convicted thereof, shall be punished as a breaker of the peace." Hence while the court say that the landlord is justified after he enters, in removing the property of the tenant, they do not intend to go any farther or to justify an act made criminal by statute.

I consider the application of the rule of law laid down in *Overdeer v. Lewis* in accordance with a class of cases found in the books, which it is important to notice.

The first case is that of *Taylor v. Cole*, 3 Term R. 292, which was an action of trespass for breaking and entering the plaintiff's house and expelling him. The pleas were not guilty, and a justification. In delivering the opinion of the court lord Kenyon remarks: "It is true that persons having only a right are not to assert that right by force; if any violence be used, it becomes the subject of a criminal prosecution; and that is the amount of the case cited from Shower, which was a proceeding under the statute for forcible entry. But this is not a criminal prosecution; and the question is, whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person who has right of entry may enter peaceably, and being in

possession may retain it, and plead that it is his soil and freehold."

A similar case is that of *Taunton v. Costar*, 7 T. R. 427, and his lordship observed: "Here is a tenant from year to year, whose term expired upon proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear that the landlord could have justified under a plea of *liberum tenementum*. If indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term." Now it appears to me these principles must rule the present case. For while we admit the binding authority of *Overdeer v. Lewis*, that the landlord has the right to enter peaceably and remove the goods of the tenant after the expiration of the term, it by no means follows that he can by force and violence turn him out without being held responsible to the criminal law of the land; and such certainly is the doctrine laid down in *Taunton v. Costar*. Hence I conceive there is a clear distinction between civil actions and criminal prosecutions for these acts by the landlord. And such are the principles ruled in *The King v. Wilson*, 8 T. R. 360, which was an indictment for forcible entry, and it is there said by the court, "No one shall with force and violence assert his own title."

The case of *Hillary v. Gay*, 25 E. C. L. 398, is not unlike the present, where it was held an action of trespass would lie. It appeared the premises belonged to the defendant, who had let it to a person by the name of Jury, who had underlet a part of it to the plaintiff. It also appeared that Jury was under notice to quit on the expiration of the lease, but that the plaintiff did not quit, but promised to in a fortnight; but he did not leave; and the defendant procured a number of Irishmen to go to the house, and after getting the plaintiff to go away, by sending a boy to tell him that his master wanted him, they then entered the plaintiff's room and turned his wife out into the street, and put the plaintiff's furniture out at the window. It was contended for the defendant that he was justified, but lord Lyndhurst ruled that he was not, and although if the plaintiff had

promised to leave, the conduct of the defendant could not be justified, and observed: "If the defendant had a right to the possession, he should have obtained it by legal means."

This distinction between a peaceable and forcible entry by a landlord, is also clearly expressed in the case of *Turner v. Meymott*, 8 E. C. L. 280. It appeared that the plaintiff had been tenant of the house to the defendant from week to week; that he had a regular notice to quit, but omitted to deliver up possession, whereupon the defendant, at a time when no body was in the house, broke open the door with a crowbar and other forcible applications and resumed the possession, there being some little furniture in the house.

The cause was tried before chief baron Guilford in 1822, who charged the jury that the plaintiff was entitled to recover. A motion was made for a new trial before the whole court, and was granted. Dallas c. j., in delivering the opinion of the court, ruled, on the authority of *Turner v. Costar*, that the landlord might enter peaceably, and no ejectment was necessary; but remarks: "If he has used force, that is an offence of itself; but an offence against the public for which, if he has done wrong, he may be indicted."

I take it that upon the principles ruled in these cases *Overdeer v. Lewis* was decided; only it was not necessary for the supreme court, under the facts presented before them, to eliminate those principles, or show their application to other cases which might arise when actual force and violence was used by the landlord.

The case of *Newton and wife v. Harland*, reported in 1 Manning & Granger 644 and 956 (it having been twice tried), also 39 E. C. L. 727, has been relied upon by the counsel for the commonwealth, and seems to be in point, where it was held that if a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him *by force* in order to regain possession. This case was very fully considered by the court of common pleas in 1840, and a remark by Tindal c. j., I consider very apposite in the case now before us. He says: "This case involves an important question, namely, whether a landlord has a right to enter and expel *by force* a tenant who holds over after his term has expired. I should have great difficulty in agreeing to the affirmative of that pro-

position, for I do not see how the defendants can justify the expulsion of the female plaintiff, under a possession obtained by an act which in itself is criminal." The cause was before the same court a second time, when the judges were divided in opinion. The chief justice, Bosanquet, and Erskine being of the opinion that the action of trespass would lie, and Coltman dissenting.

Without expressing any opinion whether the prosecutrix in the case now before us could maintain a civil action or not, it is sufficient for the purposes of this decision to adopt the reasoning and opinion of the judge who dissented, which is certainly as favourable to the defendant's counsel as he could desire; and it is this: For the preservation of the peace the law will punish for the forcible entry; but the tenant at sufferance being himself a wrongdoer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice. And he thus discriminates between civil remedies and criminal prosecutions: "The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although by those statutes all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes." On these grounds, says the learned judge, "I am of opinion, that although the defendant if guilty of a forcible entry is responsible for it in the way of a criminal prosecution, yet that as against those who are wrongdoers, and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them, in like manner as in the case of any other trespasser."

On the strength of these authorities I am clearly of the opinion, that the instruction I gave to the jury on the trial was correct, and see no reason for changing the opinion then expressed; and in thus deciding I do not think we depart from what was ruled in *Overdeer v. Lewis*. On the contrary, we place it upon the ground where the English judges have, when applying the principles involved to both civil and criminal cases; and this distinction seems to be indispensably necessary when

we reflect upon the character of the tribunals where the rights of the parties are to be examined.

In an action of trespass, the justification of the defendant would depend upon his legal right of entry, and in ascertaining this right the title of both parties would be tried. But this could not be done in a criminal court. If such was the rule, we might be compelled to try the title to a house in a prosecution for an assault and battery, or on an indictment for manslaughter. Hence it is clear that no principle can be sound when such results would follow. And I think it has been clearly shown that no such doctrine was intended to be pronounced by our supreme court, in the case relied upon by the defendant's counsel. This decision is undoubtedly based upon the ground taken by Coltman, in the case of *Newton v. Harland*, and is to be applied in both civil and criminal cases in the way he has illustrated it. The other judges make the same application in criminal cases, and concur in deciding that a prosecution for forcible entry could be sustained, and also indicate that the defendant could not justify his forcible entry when sued in an action of trespass. In Pennsylvania, if he had the right to enter and did enter, he could justify under that right in an action of trespass, and the question seems to be uncertain in England, unless it has been ruled since the decision in *Newton v. Harland*. But no case has been shown either in England or this country, where it has been ruled the landlord would not be responsible in a criminal prosecution for such a breach of the peace. On the contrary, it seems to be clear that he may be indicted for such forcible act. Hence it is held in 1 Haw. P.C. 274, on an action for a forcible entry, if the defendant proves his title to the lands he shall not pay damages to the plaintiff for *the force*; but he may be punished as a disturber of the public peace. So likewise we find it laid down by the same writer, that a joint tenant or tenant in common may offend against the statutes, either by forcibly ejecting or forcibly holding out his companion, for though the entry of such a tenant be lawful *per my* and *per tout*, so that he cannot in any case be punished in an action of trespass at the common law, yet the lawfulness of his entry no way excuses the violence or lessens the injury done to his companion, and consequently an indictment of forcible entry into the moiety of a manor is good.

It seems then to be clear that the lawfulness of the entry is not a ground of justification if the *act* was unlawful. The offence consists in the forcible manner in which the act is done, against the peaceable possession of one who occupies; it is a breach of the peace, and a crime against the public law. For that the accused must answer. On the principles above stated, the court are clearly of the opinion that the verdict ought not to be disturbed for the first reason alleged.

But the second is attended with more difficulty. My mind was not fully satisfied as to opinions expressed at the trial, but I thought it better to let the jury pass upon the facts, and have the point reserved for the consideration of the whole court. And I am now convinced that the averment in the indictment that the possession was in Jane Dewees, was bad, she being a married woman.

The possession was that of her husband, and ought so to have been averred, and the jury ought to have been instructed that the indictment could not be sustained if they believed her husband was in full life, and she was not living separate and apart from him.

The evidence on this point was clear. It was proved that once or twice the husband was at the room of the prosecutrix during her residence on the premises, and staid all night. There was no evidence of a separation. On this state of facts the possession was in the husband, and ought so to have been laid. If an action of trespass had been brought for any great injury to the property by the removal, it must have been brought in the name of the husband and not of the wife. If the husband had died, the cause of action would not have survived to the wife.

Although an indictment of this description is for an offence against the public, yet it partakes in some manner of a civil remedy. It is not for a personal injury done the wife, but for an injury done to property, and could be committed without any actual manual violence done to the person; and when an injury is done to the property, the record must show who had in law the actual possession. 1 Haw. P. C. 284.

In an indictment for stealing the goods of another, if the property was laid to be in the wife, it would be bad, because the personal property of the wife is in law the property of the hus-

band. And it would be no answer to the objection to show, that the husband was absent and the actual possession was that of the wife. On this ground, therefore, we think a new trial must be granted. But it is due to the very intelligent gentlemen who prosecute for the commonwealth to say, that when Jane Dewees made her statement of the case to them, she did not communicate the fact that she had a husband alive.

The rule for a new trial is made absolute.

IN THE COMMON PLEAS OF NORTHAMPTON CO.

BUNTING v. YOUNG ET AL.

1. Plaintiff in ejectment produced a deed of ancient date to John Nicholson for the land in dispute, which had not been recorded. Held, that the 3d section of the act of 11th March, 1843, "relating to the Nicholson court, &c." did not apply to the case so as to affect plaintiff's title, as it did not appear that any part of the land in dispute was part of the *Nicholson estate*, covered by the lien of the commonwealth.

The following is the charge of his honour Judge BANKS:

The plaintiff has given in evidence a warrant to Isaac Kreider for 400 acres, dated the 2d of August, 1793; survey of 466½ acres on the 25th of September, 1793; returned on the 20th of February, 1794; patent for 466½ acres on the 23d of January, 1832.

Warrant to James Santee, dated the 2d of August, 1793, for 400 acres; survey the 25th of September, 1793, of 450½ acres; returned the 20th of February, 1794; patent the 23d of July, 1832.

This title the plaintiff has shown to be vested in him, and it forms a regular legal title. This title, which has been thus regularly brought down to the plaintiff, will entitle him to a verdict, unless the defendants have shown a better right in themselves.

The defendants have given in evidence a warrant to Bartel Hittle, dated the 13th of May, 1786; an order of survey dated the 2d of April, 1793; the warrant called for 400 acres; a survey dated the 16th of October, 1802, of 434½ acres; and returned on the 9th of December, 1802; and patent for the same dated the 21st of December, 1802.

Warrant to Jacob Everhart for 250 acres, dated the 13th of May, 1786; order of survey 2d of April, 1798; survey of 267 acres on the 18th of October, 1802; returned the 9th of December, 1802; and patent dated the 22d of December, 1802.

Warrant to Philip Shrøder, dated the 13th of May, 1786, for 400 acres; survey on the 12th of June, 1787, of 410½ acres; order of survey on the 2d of April, 1802; survey returned the 9th of December, 1802; patent dated the 22d of December, 1802.

This title has been regularly traced to the defendants, and has become vested in them, and the question is which is the better title, the plaintiff's or the defendants'?

The defendants' warrants are dated on the 13th of May, 1786; on one of them a survey was made on the 12th of June, 1787, and was returned on the 9th of December, 1802, a period of fifteen years after it was made. It does not appear that the fees were paid; on the other two warrants no survey was made until the 16th and 18th of October, 1802, a period of sixteen years after the date of the warrants. It does not appear that the fees had been paid to the surveyor previous to making the surveys.

Are the defendants' warrants descriptive? If they are, then the title to the land would be good from their dates, if surveys were made with reasonable diligence.

If the warrants are loose, allowing a scope of several miles, then the title would date from the surveys. If they are shifted warrants, then no title would attach except there was actual notice, until the surveys were made and accepted.

These warrants are not precisely descriptive of the land, nor do they designate the land with reasonable certainty.

Whether a warrant be descriptive or not, a survey must be made, and when made it must be returned. When made, the neglect of the surveyor alone will not prejudice the owner. If the fees have not been paid, the fault becomes his, and after years the title would be postponed to an intermediate one. Here the defendants' two warrants, on which no surveys were made until the year 1802, must be postponed to the plaintiff's warrants and surveys returned for the same land. The defendants' warrant on which a survey was made in 1787, and which was not returned until 1802, must give way to the plaintiff's warrant and survey returned for the same land, because

it does not appear that the fees have been paid. Thus the plaintiff's title is the best, and must prevail. This the supreme court has put to rest in its decision of this case, when it was before that court. This would end the case, were it not for another question raised by the defendants' counsel.

In deducing his title from one of the warrants to the patentees, the plaintiff on the call of the defendant produced a deed poll of ancient date to John Nicholson, which the defendants gave in evidence. This deed poll has never been recorded. The defendants' counsel have contended that this deed, not having been recorded, is null and void, and that the plaintiff cannot recover from the defendant the land contained in it and granted by it.

This objection to the plaintiff's title rests for its support upon the 3d section of the act of assembly, passed on the 11th day of March, 1843, and which is in the following words: "That the several acts of assembly providing for the recording of deeds and other instruments of writing concerning real estate, shall be construed and taken to apply in all their force to all titles, conveyances, and instruments of writing relating to the estate of John Nicholson, or by or under which John Nicholson, his heirs and assigns, and any person or persons claiming under him and them, claim a title to real estate, and every such title arising under, and instrument of writing not being recorded according to said acts, shall be null and void against *bona fide* purchasers, and against persons in possession under any title obtained from the commonwealth, or any commissioner's or treasurer's title."

It does not appear that any portion of the land in dispute was part of the Nicholson estate, and bound by the lien of the commonwealth for the debt due by him, or that it was ever so bound has not been shown, nor has it been attempted to be shown. The defendants do not claim under said lien, and by virtue of any title from the commonwealth connected with said lien, nor do they claim under any commissioner's or treasurer's title. They claim by virtue of warrants, surveys, and patents, as an original title. The plaintiff does not claim the land as part of the Nicholson estate, bound by said lien. He claims by virtue of warrants, surveys, and patents, granted by the commonwealth in the ordinary way as an original title. The two titles are independent of each other. They are adverse rights,

hostile in their origin, progress, and completion. Each one claims under his own distinct title, denying the legality and validity of the right of the other. Thus the parties stand as regards each other. Thus they present their rights to the land in controversy.

Does this act of assembly apply to this case? In exploring the intention of the legislature I shall confine myself to this case, and to the titles of the parties in this suit; I shall leave other cases for adjudication when they arise. This law is said to be an explanatory one. I will consider it as such. If this be its character, in expounding it a strained construction cannot be resorted to legitimately. It must operate by its words, and be restrained in its application to the subject and cases expressed in itself.

The plaintiff does not claim under this deed alone to John Nicholson. He has a higher and more perfect title. He claims under a patent from the state. This patent is his title, consummated and perfected under the warrants and surveys which he has given in evidence. No one claiming under this title disputes its validity. The patent is evidence that the patentee has acquired the right to it. That this was so, no one having any interest in this title by warrant has ever denied. A warrant and survey in this state gives the legal title for most purposes. They will support an ejectment. Most of the rights incident to a legal estate are attached to this. Notwithstanding all this, the title is not complete until consummated by patent. It is notorious that in this state the warrantee is not always the owner of the land called for in the warrant in his name. The true proprietor is him who has paid the purchase money to the state, and been at the expense of having the warrant located on the land, and returned to the land office when the survey is made. Deeds poll from warrantees have in many cases been mere matter of form, regarded as being of little importance, and therefore but very seldom recorded. The recording acts no doubt did apply to them. They were held by the claimants of the land until the patent was obtained, and then thrown aside as useless. The patent was then deemed a perfect title under the warrant. The patentee did not then stand in need of his deed poll as against transgressors, or those on the land without title, or adverse claimants by title acquired from the state by

grant subsequent to the date of his patent. To declare at this late day that all such titles were null and void, where a deed poll to the patent had not been placed on record, would shake half the titles by patent in the state. Any act of the legislature that would change the recording acts so far as to declare unrecorded deeds poll anterior in date to the patent, null and void, as to adverse claimants under other and distinct titles, would cut up the land title of Pennsylvania by the very roots. To do so, would be an act of injustice which I am well persuaded the legislature never intended by the passage of the act in question.

That the recording act of 1775 only relates to purchasers under the same title, is a rule well established, and indeed was never seriously doubted by any one. It did not contemplate a purchaser under a distinct title. That was not the mischief to be remedied by it. A purchaser of one title could not be injured by an unrecorded deed of a right under which he did not claim. That deed was no part of his title. In his right he was not and could not be prejudiced by an omission to have it recorded. His right was the same, whether it was recorded or not. If he had purchased a bad title it was his misfortune; he could not retrieve his loss or make his title good, by showing that a deed under which his adversary claimed was not recorded.

The above principles are well settled. Was this section intended to change them as to deeds to John Nicholson such as this is, and in such a case as the present one? To what titles, conveyances, and instruments of writing relating to the real estate of John Nicholson, does it apply? In this consists the question, and its solution will settle all difficulty. It is well known that the state held unsatisfied liens to a large amount upon the lands of John Nicholson. Her titles had their existence in the settlement of his public accounts in the year 1776, without any legal means of raising the money by the sale of said lands. The state also had debts by judgment to a large amount against him, which by reason of his death and the want of personal representatives, the state could not resort to the ordinary means of collection. Under this state of things, laws were passed, the object of which was to raise by the sale of his lands money sufficient to pay the debts due to the state. There were adverse claims to these lands. Some had been sold for taxes. To the rights of these different claimants, the state was not

indifferent. A tender of compromise to all claimants of these lands was authorized on the part of the state. Commissioners were appointed on behalf of the state, and sales of land were made from time to time to a large amount, and compromises were made with many adverse claimants. The matter still remained open. A large amount of the debt was still unpaid. The adverse claimants became every year more numerous, and more determined in their opposition to the collection of this debt. Entire communities took part in it, and it resulted in a high state of public excitement. A court has been established to adjust all these claims. Its judgments and decrees were not received with much favour. Thus things were in 1843, when this law was passed.

The Nicholson debt, the Nicholson liens, the Nicholson estate, and the Nicholson court were terms well known to the people of this state. Therefore, is not this section of the act to be confined in its operation to the lands of John Nicholson, which were or had been bound by this state lien? Or does it apply to any deed and every deed which he may have held to any land at any time during his life? This will now be seen to be a very grave question indeed; important in its consequences, as it bears upon the just rights of other citizens—rights which were acquired under the then existing laws, and which were perfect, absolute, and vested rights until the enactment of this short section of the act of the 11th of March, 1843.

In its title the act professes to be "An act to repeal the Nicholson court, and to release the lien of the commonwealth on the estate of John Nicholson, deceased."

In the 1st section, the "Act to resettle the estates of John Nicholson and Peter Baynton," and all other acts or parts of acts "relating to the Nicholson court and commissioners" are repealed.

By the 2d section, the alleged lien of the commonwealth on all the lands belonging or supposed to belong to the estate of John Nicholson, is released.

The 3d section is the one which gives rise to the present controversy under this act. It provides that "the recording acts shall be construed and taken to apply in all their force to all titles, conveyances, and instruments of writing relating to the estate of John Nicholson." Thus far it is limited to the estate

of John Nicholson. What is this estate? It can be none other than the land which was bound by the lien of the commonwealth. Lands which were never bound by that lien formed no part of that estate. It cannot be extended to lands against which the state had no claim, and which had been granted in the usual way by patent free and clear of all incumbrances. In that case the state had nothing to do with the lands, and as they formed no part of his estate the expression cannot with any propriety be extended to them.

Then follow these words: "or by or under which John Nicholson, his heirs and assigns, and any person or persons claiming under him or them, claim a title to real estate." These are comprehensive expressions, but are they not to be limited to the subject-matter of this legislation. Restraining it to this, it may all be well enough. To extend it to all grants of land to John Nicholson, and to his heirs and assigns, and on which the state never had any lien, might do great injustice. Take the case of a grant of land to John Nicholson, and a conveyance by him before he was a public defaulter, would this section extend to such a case? There are no doubt many cases. Would his assignees in such cases, when the state never had and never claimed a lien, come within the spirit of this clause? They are within the letter. But would it not be partial, not general, and applicable to all conveyances under similar circumstances? It would operate on past deeds, and on the interests of particular individuals. The deeds of this particular individual would be singled out from all others, and incumbered with a condition not annexed to them when they were made. This in my judgment would be legislation of very questionable constitutionality. Before I would put this construction upon the words employed, this must be shown quite clearly to be their legitimate effect.

Why embrace his heirs and assigns, if it was not part of the lien estate. His heirs and assigns might take other land from strangers; can it be possible that this act applies to them? Certainly not; yet they are within the letter. It must refer to lands on which the state had a lien. The words, "or persons claiming under him or them," mean claiming under his or their lands of the Nicholson estate, and not lands on which the state never

had any lien, and which had passed into the hands of *bona fide* purchasers free and clear of all incumbrances.

In conclusion we have this provision: "And every such title, conveyance, and instrument of writing, not being recorded according to said acts, shall be null and void against *bona fide* purchasers, and against persons in possession under any title claimed from the commonwealth, or any commissioner's or treasurer's sale." The title embraced by this provision is declared "null and void." Its force is expended upon past contracts. It gives no time to record them. For if they might be hereafter recorded, its efficacy would be destroyed. The right under the unrecorded writing is cut off. It is at once legislated out of existence as against *bona fide* purchasers. What *bona fide* purchasers? Certainly those under the Nicholson lien, and against persons in possession under any title derived from the commonwealth. How in possession, and under what claim? The answer must be, under any title claimed from the commonwealth by virtue of the state lien, either by sale or compromise. As there is no title here under any commissioner's or treasurer's sale, it is not necessary to say to what cases or titles this provision applies.

That this act applies only to lands on which the state had a lien, is pretty strongly enforced by the provisions of the 6th section. That section proposes to quiet fears and remove doubts as to titles derived from the commonwealth. They are declared to be good and valid. They are to be held as fully and amply as if the lien had never existed. "Saving to all others than the commonwealth, their several rights and interests in the said lands according to the laws of this commonwealth." This section applies to all lands granted by the state on which the lien existed, but where the grant was not by virtue of the lien. It must apply to such grants, for if the grant had been made by virtue of the lien, it would have been extinguished as matter of law and of course. Then it appears, that when title has been made by grant from the state independent of the lien, that the rights and interests of others are saved. This saving provision extends to grants of lands on which the lien existed. Now if the rights of others are saved in cases where the state has granted lands on which the lien existed, how is it when a similar grant has been made of lands on which no lien existed?

Surely the law is not intended to apply to such cases, or the rights would have been saved there also. It thus appears most obvious, that the law in the 3d section was intended to apply only to the Nicholson estate. This was the subject-matter of the act. It appears in its title. It is in its provisions when they are all taken together. This is the plain interpretation of the words, and the just exposition of the enactments.

The plaintiff does not claim under the Nicholson deed only. His title is by patent. It is under the commonwealth, and is not within the words of the statute. The defendants do not claim under the Nicholson title. They claim under a distinct title. The fact that this deed poll was not recorded did not affect the plaintiffs. This suit was pending long before the law was enacted. The plaintiff's title had been decided good and valid by the supreme court before its passage. I do not suppose it was intended to reach this case by it. But legislation that operates upon actions pending is always of questionable propriety. It does not often affect the rights of the parties in actions pending, unless it is so provided. It is not so specially provided in this act. The plaintiff's title had been declared good by the supreme court. If this act applies to this case, it decides this title which was good to be a nullity.

In the trial of rights to property, the parties should have the benefit of the laws existing at the time the suit was brought. It is unjust to them to have their rights overturned by future laws, which declare that rights that were good when the suit was brought shall be null and void. Laws should be prospective. Those which have a retrospective operation are dangerous as well as odious. When they alter the rights of property, they are at variance with the principles of enlightened jurisprudence.

If the words of a law are doubtful, that construction should be given to it as is most consistent with justice and the rights of the parties. This act does not propose to vary the remedies of the parties. It does not enjoin any duty to be done by them to secure their rights. By its enactment it declares a title, which up to that time was good, null and void. It gives not a day of grace—no season of repentance—no period of probation or reformation. No notice is given to the plaintiff to record his deed—no law enjoined upon him to record his deed, to save his

right against the defendant. Thus in the absence of enjoined duty, in a case where he was in no fault, when the defendants have no priority with him and no equity against him, this statute it is argued comes in, and with a pen of iron writes down his title null and void, for not doing what no law enjoined him to do, and which omission has done the defendant no harm, and which if done could in no possible event have done them any good. This to me is, I must confess, a new idea. It is however a bold one, and certainly does great credit in this particular to the man who penned it, if that was the object. Here, as I have said, are two adverse titles, adverse in their origin, each one denying the validity of the other's title. Can it be that it was ever intended that this act should come in and declare the legal title null and void, because a deed poll anterior to the patent was not recorded?

This act if applicable is not declaratory, or one of explanation only. It must reach a distinct class of cases retrospectively, and thus operate on vested rights of freehold. It makes that law which was not law when the plaintiff's title was perfected by patent from the state. This patent gave him the exclusive and most perfect right to this land. This right could not be legislated from him and given to another. The legislature did not contemplate any such thing as this; to give it this effect would be a perversion of their purpose. It is vain to attempt to disguise it. If it applies to this case, it at once strips the plaintiff of his property, and of his right to its possession which he had acquired by existing laws. It makes his title give way to one who has no title and no equity to the land, but what he derives under this act. It not only does this, but nullifies the decision of the supreme court in this very case. This would shock the understanding of all honest men. It would be an outrage upon all intelligent sense of right. My high respect for the legislature forbids the belief that they intended any thing so unjust. If consequences of this kind had been perceived and its effects had been thus understood, it would never have become a law.

I do not think that this act has any application to this case, and that the fact that the deed to John Nicholson was not recorded, does not impair the plaintiff's title or his right to recover.

IN THE COMMON PLEAS OF CHESTER COUNTY.

[September, 1845.

REES V. FISLER.

1. A plaintiff who appeals from an award of arbitrators, made under the compulsory provisions of the act of 1836, and who fails to recover a verdict or award more favourable than the award appealed from, is not entitled to a return of the costs paid by him, on appealing.

The following case was stated for the opinion of the court, and argued by *Durlington* for plaintiff, *Lewis* for defendant.

Ezekiel M. Rees brought his action, March 22d, 1844, against John Fisler for work and labour done, and on the next day took out a rule of reference, under the compulsory arbitration act of 1836.

The arbitrators chosen, met on the 27th April, 1844, and on the 11th May awarded in favour of the plaintiff, \$216 48.

On the 27th May, 1844, the plaintiff paid the following costs, viz. sheriff \$3 12, attorney \$3, arbitrators \$12, prothonotary \$1 78, amounting to \$19 90, and appealed from the award of the arbitrators.

August 11th, 1845, by agreement of the parties, the matters in variance between them were referred to arbitrators, under the 6th section of the arbitration act of June 16th, 1836.

On the 13th August, 1845, the arbitrators awarded in favour of the plaintiff the sum of \$178 87, which award was confirmed, nisi, by the court, the next day.

The question for the opinion of the court, is whether upon the above statement of facts, the plaintiff is entitled to recover from the defendant the amount of the above costs paid on appeal, viz. \$19 90, or any portion thereof.

If the question be decided in the affirmative, then judgment to be given for the plaintiff for the whole amount of costs or so much thereof as he is entitled to recover; if in the negative, then judgment to be entered in favour of defendant.

The following is the opinion of the court, by BELL, president:

In this case, the plaintiff entered a rule for a compulsory arbitration, under the provisions of the act of 1836. The arbitrators awarded in his favour the sum of \$216 48. From this

award the plaintiff appealed, paying the costs which had accrued up to the time of appeal, and entering into the recognizance prescribed by the act of assembly. The case was again referred, by agreement of parties to referees, under the sixth section of the act of 1836, who made an award in favour of the plaintiff, for \$178 87. Upon this state of facts, the question is, whether the plaintiff is entitled to a return of the costs paid by him, on appeal, at the hand of the defendant?

The correct solution of this question must depend upon the proper construction of the arbitration act, regulating the liability for and payment of costs, in such cases; and the provisions of the act of 1836, being in this particular, borrowed from the prior act of 1810, any judicial construction which the earlier may have received, is of authority when considering the later statute.

These acts were intended to supply a complete system of costs, in cases of appeals from awards of arbitrators, and operate to repeal the statute of Gloucester, *pro tanto*, wherever their provisions are applicable. Thus it has been held, that where a defendant appeals from an award, in favour of the plaintiff, and there is a verdict against the appellant, for a less sum than the amount of the award, he is not liable for the payment of the plaintiff's costs, though he would be so by the statute of Gloucester, because by the terms of his recognizance prescribed by our act, he is bound to pay costs only in the event of the plaintiff's recovering a judgment for a sum, at least equal to the report of the arbitrators, and the recognizance is co-extensive with the plaintiff's right to and the defendant's liability for costs (*Landis v. Shaeffer*, 4 S. & R. 196; *Pratt v. Naglee*, 6 S. & R. 299; *Poke et al. v. Kelly*, 13 S. & R. 165.) Is the case now presented within the provisions of the act of 1836? For the plaintiff it is said to be *casus omissus*, and it is admitted that only upon this ground can his claim be sustained. But I think, in this the plaintiff is clearly mistaken.

The payment of costs upon an appeal, is made by the act of assembly one of the conditions of the appeal, without which it is invalid; and in this particular it matters not whether the appellant appeals from an award made in his own favour or in favour of his antagonist. Now looking alone to the terms of the act, it is to me very plain, that where the plaintiff is the

appellant he is not entitled to a return of these costs, unless in the final result of his cause, he puts himself in a more favourable position than he occupied under the award of the arbitrators. By the 29th section it is provided that if the plaintiff be the appellant he shall, &c. be bound in a recognizance to the defendant, the condition of which shall be, that if he shall not, in the event of the suit, recover a sum greater or a judgment more favourable to him than the award of the arbitrators, he shall pay all costs that shall accrue in consequence of said appeal, &c. If he recover a judgment for less than the amount of the award, *he is not entitled to recover costs which accrued on the appeal*, for by the terms of the recognizance, he is bound to pay costs, and this recognizance, according to the case of the Commonwealth v. Shannon (13 S. & R. 109), ascertains his rights as well as his liabilities in respect to costs. But the 32d section of the act enacts that the costs to be paid by the appellant as therein before required (that is on appeal), may nevertheless be taxed in the applicant's bill, and recovered by the adverse party (the appellee) if in the event of the suit, the appellant is *entitled to recover costs, agreeably to the provisions of this act*. It is only then, when the appellant may recover costs, from his adversary, agreeably to the provisions of the act, that he is entitled to call for a return of the costs paid by him on appeal. But it is said, the plaintiff's recognizance is by its terms, to be confined to the costs accruing on the appeal, and as the act contains no provision mentioning, particularly, in what event of the suit a plaintiff appellant shall be entitled to *recover costs*, the phrase "agreeably to the provisions of this act," is insensible and must be rejected, leaving the plaintiff's right to reclaim the costs paid on appeal, to stand upon the provisions of the statute of Gloucester, which gives costs whenever damages are recovered. Upon this reasoning it is assumed, that as the plaintiff's recognizance in the events which have place here, only binds him to the payment of the costs that accrued after the appeal, he is entitled to have the prior costs, though it is admitted that if the statute contained a provision expressly, giving the plaintiff costs, only when he recovered a more favourable judgment, the language of the 32d section would operate to bar his claim upon the costs of appeal. But this objection is altogether too nice and fanciful to be per-

mitted to weigh against a common sense construction. In effect it abrogates the 32d section, where a plaintiff is the appellant, except in the single instance of his failing to recover altogether. But, I think it is clear, the provisions of this section were intended to be commensurate with the plaintiff's right to reclaim the costs paid on appeal, under every event which might happen, and it is our duty to give the act such construction as will effectuate this intent, and for this purpose to make operative every word and clause of this section. This is in accordance with the general rules of construction, to reject nothing where meaning and effect may be conferred upon it, consistently with other portions of the statute, and that where one construction will work this result, while another operates to render nugatory a portion of the statute, the former is to be preferred. Looking then to the whole of the 32d section, it will be seen to have express reference to the prior provisions of the act, ascertaining the appellant's liability to the payment of costs, for there is nothing else to which the clause "agreeably to the provisions of this act" can have reference. But the provisions here referred to, must be those only which relate to the payment of the costs accruing upon the appeal, for the right of the appellant to recover the costs paid by him when appealing, is made to depend on his ultimate right to recover other costs, and these can be none other than the subsequently accruing costs. To express fully by words the meaning of the section, it may be read as if it were written: "The costs to be paid by the appellant, as herein before required, may nevertheless be taxed in the appellant's bill, and recovered of the adverse party, if in the event of the suit the appellant is entitled to recover the costs *that shall accrue in consequence of said appeal*, according to the provisions of this act." If thus read, it will not admit of question that where by the terms of the act, the appellant is *not* entitled to recover the costs accruing subsequently to the appeal, he cannot reclaim the costs paid by him on the appeal. This is one aspect under the provisions of the act. But how if a plaintiff appellant recovers a judgment more favourable than the award, and thus escapes the condition of his recognizance binding him to the payment of costs? Then, by a necessary implication flowing from the whole scope of the act, the plaintiff is entitled to have the costs accruing subsequently to the

appeal from the defendant, and as a consequence, by the express terms of the 32d section, the costs paid as appellant. The same kind of implication arises under the 30th section of the act, regulating appeals by defendants, and prescribing the form of the recognizance by which the defendant binds himself to pay all costs which may accrue on the appeal, if the plaintiff shall obtain a judgment as favourable as the award. There is nothing here expressly releasing the defendant from the payment of costs to which he would have been liable under the statute of Gloucester, on a recovery by the plaintiff to any amount, as was argued for the plaintiff in *Landis v. Shaeffer*, (*supra*), and yet it was there determined that his recognizance being co-extensive with his liability, the defendant was exonerated by necessary implication from the payment of subsequent costs, the plaintiff having recovered less than the award. By these constructions all the terms of the 32d section are satisfied. In one event the appellant is entitled to reclaim the costs paid on appeal, "according to the provisions of the act," to wit, where he is entitled to recover costs, accruing subsequently, and in another event, to wit, when the statute directs him to pay those costs, or where he is not entitled to recover them from his adversary, he also loses the prior costs. Our judicial decisions are confirmatory of these principles, for properly understood, this is the doctrine of *Commonwealth v. Shannon* (*supra*), in which case *c. j. Tilghman*, delivering the opinion of the court, put the opposite of that now before us, namely, where a plaintiff appellant from an award in his own favour, recovers a judgment *more favourable*, in that event he would be entitled to have again from the defendant the costs paid on appeal. So in *Pratt v. Naglee*, (6 S. & R. 299,) and *Bellas v. Oyster*, (7 W. 341,) it was determined that where a defendant appeals, and the plaintiff recovers a final judgment less favourable, the appellant is not entitled to the return of the costs paid on the appeal, for the reason it must be that according to the provisions of the act, though exempted from the payment of costs subsequent to the appeal, he is not entitled to recover such costs from his adversary.

The construction now given is in accordance too with the policy of the arbitration laws. In introducing our system of compulsory reference, the legislature regarded with a very

favourable eye the domestic tribunal thus created, and intended it as a forum for the final settlement of many disputes which otherwise must engage the attention of a court and jury. To effect this object, while provision was made for an appeal from its award, restraints were laid upon litigious dispositions, by annexing conditions to the right of appeal. One of these was, as we have seen, payment of all prior costs, the forfeiture of which as well as the payment of subsequent costs, was in the event of a plaintiff insisting upon more than he is justly entitled to, intended to operate as a punishment. But if such a plaintiff is entitled to have back the costs paid by him on appeal, though he recover less than the amount awarded by the arbitrators, the condition degenerates into mere form, and a portion of the restraint imposed on litigation is withdrawn. Without therefore, a violation of the spirit and policy of the acts of assembly, I cannot see how a decision can be made favourable to the plaintiff's pretensions. The court is of opinion the plaintiff is not entitled to have a return of the costs paid on appeal.

COMMON PLEAS OF LANCASTER COUNTY.

[November, 1845.]

MYERS, ADMINISTRATOR OF BARTON JR. v. BARTON SR.

1. Executors or administrators are not liable for costs, where the action is brought on a contract made by or with the decedent.

In this case, the action was upon a contract made with the intestate, and the suit having been terminated by an award in favour of defendant, a *fi. fa.* was issued against the administrator for the costs, *de bonis propriis*. And a levy has actually been made upon the proper goods of the administrator. This was a motion to set aside the *fi. fa.*

Lewis J. The statute of 23 H. VIII. c. 15, is held to be in force in Pennsylvania, 3 Bin. 619, and furnishes the rule which controls the case before us. By that statute, the defendant recovers costs where he obtains a verdict or nonsuit in an action brought upon a wrong done to the plaintiff, or upon a contract to which the plaintiff was a party. It has therefore been the uniform construction in England, 1 B. & P. 445; 2 B. & P. 253; 2 East

393; Toller 438; 2 Buc. Abr. 517, 518; that where executors or administrators bring suit upon contracts made by their decedents, they are not within the operation of the statute, and consequently not liable for costs, in case of verdict or nonsuit against them, because the action was not upon a contract made with them, but upon one made with the decedent. *Hollis v. Smith*, 10 East. 295. Where the action is for an injury done to their own possession, or upon a cause of action accrued after the death of their decedent, and in which they are under no necessity to sue in their representative character, the rule is different. They are within the meaning of the statute, and consequently liable for costs in the latter case. But the rule, although founded upon a fair construction of the words of the statute, has a higher foundation in the principles of justice and sound policy. Costs were originally intended as a punishment for the party who failed in a claim which he knew to be unjust. But how can representatives be cognizant of the injustice of the claims of their decedent? It is their duty to enforce them, and they may be made liable if they fail to discharge that duty. On the other hand, if they bring suit, in accordance with their obligations to the creditors and others interested, and fail, by reason of facts which were entirely unknown to them at the time of bringing the suit, or if, as soon as they ascertain the injustice of their suit, they discontinue or suffer a nonsuit, it would be a great hardship to compel them to pay the costs of the action out of their own estate. The policy and justice of the rule which relieves them from this hardship is so ably vindicated by the present chief justice in *Musser v. Good*, 11 S. & R. 247, and its existence in this country, as well as in England, is so clearly established in that case, that nothing farther remains to be said. The case is directly in point, and is not understood to have been overruled by *Mundorf v. Mundorf*, in 2 Rawl. 180. It is not to be denied that the course of reasoning of Mr. justice Rogers in the latter case, is at variance with that of the present chief justice in the former. But the cases themselves, and the points decided, are not in conflict. And it is expressly stated in the last case, that there was no intention to interfere with the decision in the first, in which the question was whether the administrator could be made liable to pay the costs out of his own estate. In the case last decided, the

question was, whether the costs could be levied upon *the land of the testator*. And the two may be reconciled by considering them as establishing the principle that the goods of the decedent are liable for the costs of an action, in which the representative fails to recover, but the representative himself is not personally liable for the costs in such cases. Understanding this to be the rule, the *fi. fa.* is ordered to be set aside.

Reports of Cases adjudged in the Supreme Court of Pennsylvania. By FREDERICK WATTS and HENRY J. SERGEANT. Vol. VIII. Containing the Cases decided in part of September Term and in December, 1844, and in March Term, 1845. Philadelphia: James Kay Jr. & Brother, 183½ Market street. Pittsburg, C. H Kay. 1846.

THIS volume, it is understood, concludes the series of Reports edited by Messrs. Watts & Sergeant, and in a short time we may expect to have the first volume of the Pennsylvania State Reports. We have no doubt that the system of law reports published by the authority and under the supervision of the legislature, will be found to work well, and we have no apprehension that complaints such as we have heard for the last three years, will continue to be made. The law of 1845, instituting the office of State Reporter, was not hastily framed, nor lightly considered. But there is one feature in it open to objection, and that is the proviso which excludes dissenting opinions from publication. Much might be said upon this subject, and instances of great number adduced to show, that some of the noblest monuments of judicial learning and ability, are to be found in the dissenting opinions of eminent judges, both in England and America. As yet we have heard but flimsy excuses for a provision, which will go far towards suppressing discussion. As recent evidence of the value of such opinions, we would refer to the case of *Fish v. Sarbar*, 6 W. & S. p. 30, Rogers j. dissentiente. Apart from the question, whether the point decided is sanctioned by reason and authority or not, nothing but a dread of open and free debate, upon points of law and logic, and we might add also, of conscience, would condemn to silence the able argument which Mr. justice Rogers adduced against the opinion of a majority of the court.

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VOL. V.

SELECTIONS FROM 8 VOL. OF WATTS & SERGEANT'S
REPORTS.

AMENDMENT. It is not in the power of the court of common pleas to permit an amendment after suit brought, by which the christian name of one of the plaintiffs should be changed.* *Horbach v. Knox*, 8 W. & S. 30.

2. Where an act of assembly directs a penalty to be recovered by any person suing for the same, the sum when recovered to be paid one half to the person suing, the other to the treasurer or county commissioners, a common informer may sue in his own name. *Megargell v. The Hazleton Coal Company*, ib. 342.
3. Where the practice is on appeal from a justice to go to trial on his transcript, and the justice orders that the penalty be paid one half to the plaintiff and the other half to the county commissioners, this is equivalent to a declaration *quit tam*. *Ib.*
4. Where a person sues as common informer, an amendment to the declaration that he sues as well for himself as the treasurer of the county, ought to be allowed. *Ib.*

* On Saturday, January 30th, 1846, the court of common pleas of Philadelphia allowed an amendment of the christian name of the plaintiff, in the case of *Dohan v. Walsh*, being an appeal from the judgment of a justice. King president, remarked, in reference to the decision cited in the text, that *Horbach v. Knox* must have been a case originally brought in the common pleas and not carried there on an appeal, as the discretion of the court in allowing amendments in the latter class of cases was much larger than in the former, and extended to the motion before them.—EDITORS.

APPRENTICE. Where the father is living with the mother, to make a valid indenture of apprenticeship of their son, the assent of the father before the magistrate at the time of the binding, expressed in writing, is necessary: the assent of the mother is not sufficient. *Commonwealth v. Crommie*, 8 W. & S. 339; S. C. 4 Penn. Law Jour. 297.

ASSIGNMENT. A draft upon a particular fund in the hands of an attorney for collection is an equitable assignment of it, and although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. *Newmirth v. Drum*, 8 W. & S. 9.

2. A general assignment for the benefit of creditors by one who is a member of a partnership, gives to his assignee no control over the partnership funds or claims, so as to enable him to receive or release them. *Moddewell v. Keever*, ib. 63.

BANKRUPT LAW. Ground-rent coming due after the discharge of the debtor as a bankrupt is not extinguished by his certificate. *Bosler v. Kuhn*, 8 W. & S. 183. See also S. P. *Large v. Bosler*, 3 Penn. Law Jour. 246.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Where a certificate of deposit not negotiable is issued by a bank and afterwards sold by a broker, who indorses it without recourse, and it turns out that the indorsement of the payee was forged, the broker's liability depends upon the parol circumstances attending the sale of the note. *Charnley v. Dulles*, 8 W. & S. 353.

2. It is for the jury to say whether on the evidence the plaintiff took the note subject to every risk or not. *Ib.*
3. The question of laches in presenting a certificate of deposit to the bank for payment, is a mixed question of law and fact. *Ib.*
4. So also is the time of giving notice to the prior indorser. *Ib.*

COMMON CARRIERS. (The judgment in the case of *Russell v. Whitesides*, reported in 3 Penn. Law Jour. 182, is reversed, but upon points which do not affect the correctness of the law laid down by the court below.) See 8 W. & S. 44.

2. Parol evidence is admissible to show the contents of a hand-bill put up in a stage-office four years before, containing a

notification of limited responsibility. *Whitesell v. Crane*, ib. 369.

3. Evidence of the usual course of a stage-office for passengers to call there and have their names registered in the stage-book and where they were to be called for, is evidence to affect a party with notice. *Ib.*

4. The printed conditions of a line of public coaches are sufficiently made known to passengers by being pasted up at the place where they book their names. *Ib.*

CONTRACT. A contract which is usurious cannot be confirmed so as to make it available to either party. *Chamberlain v. M'Clurg*, ib. 31.

2. The settlement of an existing controversy being a good consideration for a contract, a party having a good defence to the payment of his obligation may release it upon an agreement of compromise, and if he do so, he will be thereby estopped from setting it up as a defence afterwards. *Ib.*

3. Defendant guaranteed to plaintiff \$3000 commissions for transporting goods west for defendant, plaintiff covenanting to forward no goods for any other person or line for any place west of Hollidaysburg. Plaintiff cannot recover on the guaranty, if he forwarded goods by other lines as far as Hollidaysburg, if their ultimate destination was for places west of Hollidaysburg. *Martin v. Shoenberger*, ib. 367.

4. A person cannot recover for part performance of an entire contract, where he has failed in the performance on his part. *Ib.*

CONSTITUTIONAL LAW. The 1st section of the act of 3d February, 1843, transferring the jurisdiction of the criminal court to the court of oyer and terminer, general jail delivery and court of quarter sessions for the city and county of Philadelphia, is not unconstitutional. *Commonwealth v. Zephon*, ib. 382; *Zephon's case*, 4 Penn. Law Jour. 362.

EVIDENCE. In an action against an attorney at law, for negligence in conducting and prosecuting the claim of his client, the opinion of a witness as to the discretion exercised by the defendant, cannot be given in evidence. *Livingston v. Cox*, 8 W. & S. 61.

2. In an action of ejectment when either party claims by virtue of the act of limitations, it is competent for him to give in

evidence his own declarations made at the time he went into possession, in order to show that his entry was adverse.

Miles v. Miles, ib. 135.

3. In an action of ejectment, where the question arises upon the validity of the original title of the parties, and not upon the extent of the claim or the act of limitations, the payment of taxes for the land by one party or the other cannot affect the title, and is therefore illegal evidence. *Quin v. Brady*, ib. 139.
4. A party may cross-examine as to the *res gestæ* given in evidence, though it be new matter. *Markley v. Swartzlander*, ib. 172.

The subscribing witnesses to an instrument are required to enable the opposite party to inquire into the circumstances attending the sealing and delivery. *Ib.*

ERROR. In an action of ejectment, when the title of the parties depends upon written evidence, it is error in the court to submit it to the determination of a jury. *Connellogue v. English*, ib. 11.

EXECUTION. (The judgment in the case of *West v. The Franklin Insurance Co.*, reported 3 Penn. Law Jour. 299, is affirmed.)

2. Any debt due by the garnishee in a foreign attachment to the defendant at the time of the answer to interrogatories, is embraced by the attachment. *Franklin Fire Insurance Company v. West*, ib. 350.
3. A claim uncertain at the time of the attachment but rendered certain at the time of the answer to the interrogatories, is embraced. *Ib.*
4. An assignment after the attachment is subject to its lien, and will not convey as against the plaintiff in the attachment a claim uncertain at the time of the attachment, but fixed and ascertained when the answers to the interrogatories are put in. *Ib.*
5. Ground-rent created by deed with a clause of re-entry, is payable out of the proceeds of a sheriff's sale of the property under a judgment by a stranger in preference to such judgment. *Pancoast's Appeal*, ib. 381.
6. In the distribution of moneys raised by a sheriff's sale of goods, no other person than the defendant in the execution or

his legal representatives, will be permitted to object that a judgment on which another execution has been levied on the same goods, was erroneously entered, or the execution erroneously issued thereon. *Lowber and Wilmer's Appeal. Wilson, Jones & Co.'s Appeal*, ib. 387.

7. Nor will the defendant or his representatives be permitted to do so in a collateral action or other manner than by suing out a writ of error or by making a direct application to the court in which the judgment is entered or from which the execution has been issued, to vacate it or set it aside. *Ib.*
8. A judicial sale divests all liens definite and certain in their amount. *Commissioners of Spring Garden's Appeal*, ib. 444.
9. Therefore the lien of the commissioners of Spring Garden for curbing and paving in 1836 and 1837 under the act of 3d March, 1818, is divested by a subsequent sheriff's sale in 1841. *Ib.*
10. And this is the case though the property be sold subject to the ground-rent then existing and created before such lien. *Ib.*
11. *Quære*, if the contest were between the owner of the ground-rent and the commissioners as to the appropriation of the proceeds of sale, to whom the money would go. *Ib.*
12. *Quære*, whether a different case would not be presented if the claim of the commissioners had been filed of record under the act of 16th April, 1840; and whether the whole estate, ground-rent and all, does not pass to the sheriff's vendee by a judicial sale in pursuance of the provisions of that act. *Ib.*

EXECUTORS AND ADMINISTRATORS. A creditor of an intestate does not release the real estate of the decedent from liability by suing and obtaining judgment against the administrator alone, without joining the widow and heirs under the 34th section of the act of 24th February, 1834, where the sale of the real estate for the payment of debts takes place by order of the orphans' court on the application of the administrator. *Murphy's Appeal*, ib. 165.

2. The 34th section of that act means that the judgment obtained shall not be paid by force of an execution issued thereon. *Ib.*
3. After judgment obtained against the executor or adminis-

trator, the plaintiff may issue a *scire facias* thereon against such executor or administrator, and the heirs or devisees to recover the same out of the real estate, and such heirs or devisees may make the same defence which they could have made if originally joined in the suit. *Ib.*

4. But where such judgment is obtained against the administrator alone, and a sale is about being ordered by the orphans' court, that court ought to allow the heirs to show, if they can, that the creditors' claim is unfounded, as fully as they could in an action in which they were joined as parties. *Ib.*
5. An award of money to a lien creditor who has no lien, cannot be questioned in a collateral proceeding depending in the same court. *Yerkes's Appeal, 224.*
6. G. purchased lot No. 1 on the 14th December, 1835. On the 24th March, 1836, B. obtained judgment against G., which was revived on the 18th May, 1840. On the 21st March, 1838, G. purchased lot No. 2. Y. obtained judgment against G. on the 3d December, 1838. On a sheriff's sale in 1842 of No. 2, the proceeds were decreed to B's judgment. No. 1 was afterwards sold by the sheriff. Held that the equitable right of substitution did not apply so as to give Y. the amount of his judgment out of the proceeds of No. 1. *Ib.*

FEES. (See Pleading.)

- HUSBAND AND WIFE.** Upon the sale by a husband and wife of the wife's lands, and a subsequent separation, an agreement between them that one half of the unpaid purchase money shall be paid to the attorney of the wife for her sole use and maintenance, upon her giving security to indemnify the husband against any debts which she might contract, is binding between the parties; and upon the money having been paid by the purchaser to the attorney of the wife, the husband cannot maintain assumpsit for money had and received against him, although the wife had not given the indemnity against her debts, which the agreement required: he could only sue and declare specially upon the agreement, setting out a breach, and the damages then recoverable would be measured by the amount of debts of the wife which the husband had been obliged to pay. *Lehr v. Beaver, ib. 102.*
2. A husband and wife seised, in right of the wife of an estate

of inheritance, "granted, demised, leased, set and to farm let the same unto A. B., to have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, he yielding and paying therefrom and thereout yearly and every year hereafter to the said grantors, their heirs and assigns, the yearly rent of \$100;" and in the same deed the grantees covenanted to erect a house upon the premises of the value of \$400; and upon their failure so to do, a right to the grantors to re-enter was reserved: Held, that upon the death of the wife the husband was seised of the whole estate, created by the deed, in fee, and that it was subject to a levy and sale for the payment of his debts. *Robb v. Beaver*, ib. 107.

JUDGMENT. To affect land in the hands of a purchaser, a judgment must have been not merely simultaneous with but anterior to the conveyance; and the precise time at which the judgment was entered may be shown by less than record proof. *Mechanics' Bank v. Gorman*, ib. 304.

LAND LAWS. If a warrant for vacant land be put into the hands of the deputy-surveyor, and the land is bounded by older surveys made, marked upon the ground and returned, the deputy may execute such warrant by adopting the old lines and returning the survey accordingly without actually going upon the ground. *Quin v. Brady*, ib. 139.

2. There is no law to prevent a deputy-surveyor from becoming interested in the location and appropriation of vacant lands, or for a consideration pointing them out to another for appropriation, provided he acts with good faith towards all others in his official conduct respecting the same. *Id.*

LANDLORD AND TENANT. The act of 3d April, 1830, (which enables a landlord to dispossess his tenant on fifteen days' notice, for non-payment of rent), does not apply to the case of a landlord and tenant, where the tenant refuses to pay rent under a claim of right to the reversion, which, being a denial of the landlord's title, gives him an immediate right of entry and action at the common law. *Clark v. Everly*, ib. 226.

PARDON. The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by

law, and it lies on the grantee to perform it. *Flavell's case*, ib. 197.

2. If he does not, in case of a condition precedent, the pardon does not take effect—in case of the condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect. *Ib.*

PARTNERSHIP. (See Assignment.)

PLEADING. To recover the penalty in the fee-bill, the narr. should state the particular service for which the officer took an illegal fee. *Sechternacht v. Watmough*, ib. 162.

2. On a narr. charging generally that the defendant, for services done in his office of sheriff, on a writ of *fieri facias*, took other and greater fees than were allowed by act of assembly, the judgment was arrested. *Ib.*

PRINCIPAL AND AGENT. If an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, notwithstanding the bank, after notice, had paid the money on the check of the agent. *Frazier v. The Erie Bank*, ib. 18.

TRUSTS AND TRUSTEES. It is not universally or even generally true that money which has come to the hands of a trustee by the act or consent of his colleague, without positive negligence on the part of the latter, is chargeable indifferently to either. *Jones's Appeal*, ib. 143.

2. The diligence required of a trustee in the care of the trust estate, is precisely the diligence which a man of ordinary prudence would practice in the care of his own. *Ib.*
3. Held, therefore, that where joint guardians in affluent circumstances and in good repute, apportion the custody and management of the property to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to intermeddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his colleague was manifestly impairing the estate. *Ib.*

VENDOR AND VENDEE. If bonds and a mortgage be given by a vendee to secure the payment of the purchase money of the land sold, it is competent, in an action upon the bond, for the vendee to prove that it was a part of the contract of sale

that the vendor was to look alone to the property sold as a security for the payment of the purchase money. This proof, when made, constitutes no defence to the recovery of a judgment upon the bond, but the court will so control the execution of it, that it shall not be levied upon any other estate or property of the vendee. *Irwin v. Shoemaker*, ib. 75.

2. In an action of ejectment brought to enforce the payment of the purchase money, where the plaintiff retains the legal title, it is not requisite that the plaintiff should have tendered a deed before suit brought, where he claims a conditional verdict; it is sufficient if done on the trial. *Markley v. Swartzlander*, ib. 172.

WILL. It is essential to the probate of a will, to which the alleged testator did not sign his name but made his mark, that it should be proved by two witnesses that he was so infirm as to be unable to write his name: it is not sufficient that it should have been testified by one witness that he was unable to write, and by the two subscribing witnesses that he acknowledged the instrument to be his last will and testament after he had put his mark to it. *Cavett's Appeal*, ib. 21.

2. Will made 16th April, 1837: the defendants alleged another will made about the 17th June, 1837, different in its dispositions, revoking former wills, and that it was destroyed or suppressed by fraud.

Held, 1. That if such destruction or suppression is shown expressly or by circumstances, and that the dispositions of the second will are inconsistent with those of the first, it amounts to a revocation.

2. When the second will cannot be found, and the question is what became of it, the first presumption is that it was in the possession of the testator, and that he cancelled it; but if it was in the possession practically of the wife or executor whose interests are adverse to it, proof ought to be given on the subject, and the absence of proof is an argument against the presumption.

3. In case of spoliation or fraud in respect to the second will, it is not necessary to show its contents, or in what respect it revoked the first, as must be done in ordinary cases. *Jones v. Murphy*, ib. 275.

IN THE COURT OF COMMON PLEAS FOR THE CITY
AND COUNTY OF PHILADELPHIA.

[September Term, 1845.]

WHITE, WARNER & CO. v. DOAK ET AL.

1. A general assignment for the benefit of creditors, is within the meaning of the 33d section of the act of 12th July, 1842, relating to stay of execution.

This case came before the court in the nature of a case stated as follows:

This is an action of *scire facias*, on a recognizance given for stay of execution under the 33d section of the act of assembly of the 12th of July, 1842, entitled "an act to abolish imprisonment for debt and to punish fraudulent debtors."

On the 17th of July, 1844, White, Warner & Co., the plaintiffs above named, recovered a judgment before alderman Palmer against J. W. Jermon, for the sum of eighty-three dollars and seventy cents.

On the 26th of July, 1844, John Doak the defendant above named, entered into a recognizance for stay of execution on said judgment, in the following terms: "July 26th, 1844, John Doak, Second and Mackey streets, became special bail in the sum of \$ 167, for stay of execution under the act of assembly, A. D. 1842 (July 12th.)"

At the time of said judgment, the said J. W. Jermon was possessed of property liable to be taken in execution, sufficient to pay the said judgment and costs.

On the 13th of December, 1844, the said J. W. Jermon executed a general assignment of all his property for the benefit of his creditors, whereby he assigned and conveyed to his assignees property liable to be taken in execution to the value of three thousand three hundred and ninety dollars.

On the 15th of May, 1845, the said plaintiffs caused to be issued an execution upon the said judgment, against the said J. W. Jermon, which was afterwards, to wit, on the 2d of June, 1845, returned "no goods found," and no part of the same has yet been paid.

If upon these facts, the court is of opinion that the plaintiffs are entitled to judgment, then judgment is to be entered for them

for the amount of the original judgment against J. W. Jermon, with interest to the time of judgment, and costs.

If otherwise, then judgment to be entered for defendant.

Bayard for plaintiffs. *Crans* for defendants.

KING, president: The case comes as well within the letter as the spirit of the 39d section of the act of the 12th of July, 1842. The entry of bail for the stay of execution, prevented the plaintiff realizing the fruits of his judgment from the only source to which he could resort, viz. the property of the defendant. The terms on which by law the defendant is permitted to retain his property, are that he shall neither remove, secrete, assign, or in *any way* dispose of it, *except* for the necessary support of himself and family, until the plaintiff's demand shall be satisfied, or until the expiration of ten days after the plaintiff shall be entitled to execution on his judgment. If a defendant so circumstanced, should hand over to different creditors, after entering into such a recognizance, part of his property to satisfy each, this certainly would be an assigning and disposing of it within the act. And there is no substantial difference between such a disposition of property, and a general assignment of it for the use of creditors. The theory of the law is, that a vigilant creditor who has prosecuted his claim to judgment, shall not be deprived of the fruits of his vigilance, by the defendants entering bail to stay execution, and then assigning his property to other creditors, or in any other way disposing of it, to defeat such judgment creditor, except for the sustenance of himself or family, pending the stay of execution.

There must be judgment for the plaintiff.

IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF PHILADELPHIA.

[January 24, 1846.]

FLANIGAN v. THE WASHINGTON MUTUAL INS. CO.

1. Plaintiff declared on a policy of insurance, alleging a total loss of his brig by perils of the sea, viz. by storms and ice in the Delaware bay on or about the 4th February, 1844, on her voyage from Philadelphia to Wilmington. Defendant pleaded that the vessel was of the burden of seventy-five tons or more, and set sail on her voyage, without having received a pilot on board to conduct her to the capes of the Delaware, according to the act of 29th March, 1803. On demurrer, held, that the plea was good and a bar to the plaintiff's action.

This was an action on a policy of insurance, dated November 30, 1843, for \$2000, on the brig *Morosco*—Warren, master, for 6 months from November 24, 1843.

The narr. was in the usual form, alleging a total loss of the brig by perils of the sea, viz. by storms and ice, in the Delaware bay on or about the 4th February, 1844, on her voyage from Philadelphia to Wilmington, N. C.

The 6th plea averred that the said vessel, &c., was of the burthen of seventy-five tons or more, and set sail and departed on the said voyage in the said declaration mentioned, without having, in accordance with the act of assembly in such case made and provided, received a pilot on board to conduct her to the capes of the Delaware, concluding with a verification.

To this plea the plaintiff demurred generally.

G. M. Wharton for plaintiff. *F. W. Hubbell* for defendants.

On Saturday, January 24, 1846, the opinion of the court was delivered by

SHARSWOOD J.: It has been strenuously contended, that if a vessel sailing from the port of Philadelphia does not receive a pilot on board according to the provisions of the act of assembly of March 29, 1803, any policy of insurance effected on such vessel, is absolutely void. There can be no doubt that an act prohibited merely under a penalty, is unlawful; and any contract in which any unlawful act enters, either as the whole or part of the consideration, is invalid. But it would be going much farther, and we think too far, to say that wherever either party in the course of the performance of his part, as in this case, does an illegal act, not entering into the consideration and not

injuriously affecting the other party, such illegal conduct shall taint the whole contract, *ab initio*, with illegality. (*Atkinson v. Abbott*, 11 East 125; *Johnson v. Hudson*, *id.* 181; *Ward v. Wood*, 13 Mass. 539; *Palley v. The Ocean Ins. Co.*, 14 Maine 141; *S. C.* 13 Peters 157; *Warren v. The Man. Ins. Co.*, 13 Pick. 518; *Clark v. The Protection Ins. Co.*, 1 Story's Rep. 109.) It is necessary, therefore, to consider the case upon other grounds.

It ought to be noticed, that the act of assembly of 1803 is materially modified by the act of congress of 3d March, 1837 (4 Story's Laws 2536), which provides "that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters, which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding." Conceding the subject of pilotage in bays and rivers, to be within the constitutional powers of the federal government, it will be seen that this act does not assume to make any regulations, but only provides that no one state shall have exclusive control of the matter, even in regard to her own ports, where they are situated upon waters forming the boundary between two states. It does not repeal the act of assembly, but excuses its violation in a single case. As the court cannot judicially take notice that there are any laws upon the subject in the state of New Jersey, it lies properly upon the plaintiff to set up by pleading this excuse, if in point of fact he can maintain such a plea. In all other respects, our act of assembly stands untouched, as the general jurisdiction of the states to regulate the subject, is in fact distinctly recognised by the act of congress.

What then is the operation of the act of assembly, upon the question raised by the demurrer in this case?

We consider that act as competent to establish and as actually establishing two things:

1. That the river and bay of Delaware is pilot ground for all vessels engaged in foreign trade, and for vessels in the coasting trade of more than seventy-five tons burthen.

2. That the only persons who are to be considered competent pilots, are such as have been duly authorized to pursue that occupation according to the act.

If these are conclusions as to the will of the legislature which we are bound to draw, it will not be difficult to arrive at a proper determination as to the sufficiency of the defendants' plea.

It is part of the implied warranty of seaworthiness, that there shall be on board the vessel at the time the risk commences, not only a sufficient crew and a master of competent skill and ability to navigate her, but if she sails from a port where there is an establishment of pilots, and the nature of the navigation requires one, that the master should take a pilot on board (*Park J. in Phillips v. Headlam*, 2 B. & Ad. 380). It is contended, however, on the part of the plaintiff, that a man may have competent skill as a pilot who is not licensed; and that it is a question of fact for the jury whether there was on board a pilot of competent skill: and that it is also a question of fact whether it was customary or necessary for a vessel engaged in the coasting trade, of the burthen of the one in question, to take any pilot, provided the master is shown to have had competent skill to conduct her to the ocean. This would undoubtedly be the case upon an allegation of unseaworthiness, under the general commercial law, and apart from any legislative provisions. But the legislature have decided these points by explicitly declaring that every such vessel shall be obliged to receive a pilot—evidently meaning a pilot duly authorized according to the act of assembly. These, then, are no longer questions of fact, but questions of law, as far as the port of Philadelphia and the bay and river Delaware are concerned. The assurer would not be allowed to allege that the pilot taken on board was not competent, if he was in fact duly licensed; and there would be an evident want of mutuality and equity, if the converse of the rule was not held to apply to the assured. The law was passed, not for the sake of giving a monopoly of this branch of business to a particular set of men, but for an important public object, the advancement of the commerce of Philadelphia, by insuring a character of safety to the navigation to and from the ocean. It is incumbent upon the courts so to construe and apply the law as to promote that object: and it certainly cannot be done by merely confining its operation to the infliction of the penalty.

It is no answer to this course of reasoning, that the omission to take a pilot was the neglect or misconduct of the master. It may be admitted as far as this case is concerned, according to

the later decisions in England, that where a loss arises from one of the perils insured against, though remotely caused by the negligence or misconduct of the master or crew, the insured may nevertheless recover. That doctrine, however, is by no means settled in the courts of the United States. (See 13 Johns. 451; 8 Pick. 14; 8 Mass. 14; 1 Wash. C. C. Rep. 279; 5 Hamm. 433; 3 Mason 6; 3 Peters 222; 7 Hamm., pt. 1, 276—pt. 2, 5; 14 Mass. 1; 1 Sumner 218; 2 Smedes & Marshall 340; 11 Stanton 147; 1 Humphreys 242). But neither in this country nor in England, has it ever been allowed to save the insured from the consequences of a breach of a warranty, express or implied. A warranty is a condition, and the violation of it, whether material to the risk or not, puts an end to the contract. It certainly is no answer to the allegation of unseaworthiness, that the insured had given all proper instructions, and that by the disobedience and negligence of the master, the vessel was not "tight, staunch and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage." A deviation has never been held to be excused upon such a ground: for it is an implied warranty, that there shall be no deviation. (*Tait v. Levi*, 14 East 481; *Brazier v. Clapp*, 5 Mass. 1; *Kettell v. Wiggins*, 13 Mass. 68). The very object of a warranty would be frustrated by allowing such an answer.

It is said, however, that the implied warranty of seaworthiness relates only to the commencement of the risk—that this was a time policy, and the risk commenced some months before the ship set sail on the voyage in which the loss is alleged to have occurred. But it is a recognised exception to this general rule, where pilots or a particular description of crew are necessary in certain parts of the voyage: and there is no difference as to the implied warranty of seaworthiness, between time policies and others. (3 Steph. N. P. 2120). Even where the subsequent unseaworthiness in an ordinary insurance upon a particular adventure, is a consequence of one of the perils insured against, it is the duty of the insured to use due diligence to repair it at the next port of refuge, refreshment or trade, and his negligence in that respect will discharge the insurer. (3 Kent's Com. 287, 288). And though it may be a question whether the liability of the insurer is absolutely gone after that period, or only *sub modo* as to losses which can be traced to such unsea-

worthiness (3 Kent 289), yet that question does not arise here, for in all cases where a vessel is insured at a port or in dock, though the insurance *pro tanto* then attaches, and the risk to some extent begins, yet her complement of crew and equipments is not required to be complete until she is ready to sail on her intended voyage. It is no answer that she was seaworthy at the precise moment when the policy attached, if she was not so when she sailed. (*Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Paddock v. The Franklin Ins. Co.*, 11 Pick. 227; *Cruder v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. Rep. 339; *Cleveland et al. v. The Union Ins. Co.*, 8 Mass. 308).

As the defendants' sixth plea, to which this demurrer has been entered, is in our opinion a sufficient bar to the whole action of the plaintiff, the other issues of fact which have been joined, are unnecessary (*Mansell on Demurrer* 112; 3 M. & S. 156): and accordingly, on the whole case, we enter

Judgment for the defendants.

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IN THE CIRCUIT COURT OF THE UNITED STATES  
IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[October Sessions, 1845.]

BAYARD *v.* BAYARD.

1. Where the proceeds of goods levied on by the marshal under process from the United States' courts exceeds the amount of the executions in his hands, although a sheriff under process from the state courts cannot take possession of the property in the hands of the marshal, yet the defendant's interest in the surplus becomes vested in the sheriff, on the delivery to him of the execution from the state courts; nor can this be defeated by any process subsequently issued out of the United States' courts.
2. The proceeds will be treated as if but one jurisdiction existed, and moneys paid into court will be awarded to the party who could have recovered from the marshal, had the money remained in his hands.

Sur rule to show cause why R. H. Bayard should not take money out of court.

Argued November 15, 1845, by

*William Rawle* esq. for R. H. Bayard.

*Benjamin Gerhard* esq. for the Farmers' Bank of Delaware.

*Benjamin H. Brewster* esq. for the Bank of Middletown.



The material facts upon which the motion was argued, are stated in the opinion of the court, which was delivered by

RANDALL J. On the 23d of August, 1845, several writs of *feri facias* were issued out of this court at the suits of various plaintiffs, against Henry M. Bayard, and were on the same day delivered to the marshall, who by virtue thereof, levied upon and sold the personal property of the defendant, situate in Dauphin and Lancaster counties; the sale commencing in Dauphin on the 8th and ending in Lancaster county on the 11th of September; the sales in Dauphin county not being sufficient to satisfy the executions then in the hands of the marshall, but the aggregate amount of both sales, producing a surplus of about \$1500 after satisfying all the executions then in his hands. This surplus having been demanded by several claimants, the marshall has paid the money into court, where the several parties have urged their respective claims to receive it.

On the 28th of August, 1845, the Farmers' Bank of Delaware issued a *feri facias* on a judgment obtained against the defendant in the court of common pleas of Dauphin county, which was delivered to the sheriff of that county on the same day.

On the 9th of September, 1845, two writs of *feri facias* were issued on judgments entered in the court of common pleas of Lancaster county in favour of the Bank of Middletown, against the defendant, and delivered to the sheriff of Lancaster county on the morning of that day. Verbal notice of these last mentioned writs was given to the marshall on the 10th of September, by the sheriff of Lancaster county, who made return as follows: "September 11th, 1845, levied on a quantity of ore on the bank of the canal, near Columbia, a quantity of tools, &c., at the ore bank, subject to the levy made by the United States' marshall."

On the 11th of September, R. H. Bayard issued a *feri facias* on a judgment obtained by him in this court, which was delivered to the marshall at 1 o'clock P. M. of that day. To this writ the marshall returned, that "Before this execution came to hand, I had levied on property of the defendant under prior executions, and sold the same from the 8th to the 11th of September."

The plaintiff in this judgment (R. H. Bayard), claims the money paid into court, and contends that the executions issued from the state courts could have no effect, inasmuch as the property sold was in the custody and possession of the marshall, by virtue of his prior levy when these executions issued, and therefore not liable to any process issued from the courts of the state; and the case of *Hagan v. Lucas*, 10 Peters 400, is cited in support of this claim. In that case it is decided, that "property once levied on remains in the custody of law and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction." To this doctrine I most fully assent, and agree that "a most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other." The sheriff of Dauphin or of Lancaster county, could not therefore by virtue of the process placed in his hands, take the property levied on out of the custody of the marshall. The executions in his hands, vested the property in him to the extent of the debt, interest and costs on those executions, but no more: if he levied on property of the defendant exceeding in value the amount of the executions in his hands, then for the excess he was a trespasser, (*Watson on Sheriff* 175.) It is true, the law does not require a marshall or sheriff to determine exactly the value of the property levied on by him, and if his proceedings appear to have been bona fide, will not visit him with vindictive damages, if the goods levied on produce more than the amount of the execution; but the property in the excess remains in the defendant, who may execute an assignment or transfer of such property, and the assignee would have a right to receive it from the marshall in preference to any subsequent lien; or if no subsequent change of property takes place, the defendant would be entitled to receive any surplus remaining in the hands of the marshall after satisfying the executions.

The defendant then retained an interest in the property subject to the levy by the marshall, and although the sheriff could not take possession of the property levied on or remove it from the custody of the marshall, the delivery of the executions from the state courts to the sheriff, divested the interest of the

defendant (whatever that may have been), and vested it in the sheriff for the use of the plaintiffs in the executions, as firmly as if he had executed a formal and voluntary assignment of such interest (act of 16th June, 1836), and this could not be defeated by any process subsequently issued by the courts of the United States; *Prince v. Bartlett*, 8 Cranch 431; *Beaston v. The Farmers' Bank of Delaware*, 12 Peters 136.

The sheriff could maintain an action to recover the amount of that interest before the return day, although no levy had been made by him; 2 Serg. & Rawle, 157; 1 Wash. C. C. R. 29; 3 Wash. C. C. R. 60; 1 Baldwin 246; 1 Penn. Law Jour. 317.

In this view of the law there can be no conflict between the federal and state courts; each will proceed within the limits of its prescribed jurisdiction, and if from any cause, property or its proceeds which is legally subject to the jurisdiction of the one, should come under the equitable control of the other, it will be disposed of as though there had been but one jurisdiction. And in the distribution of moneys paid into court, the court will always award it to the party who would have a right to recover it from the marshal or sheriff, had it remained in his hands.

In the present case, the amount of money in court, not being sufficient to satisfy either of the executions issued from the state courts, prior to the *feri facias* of R. H. Bayard, the rule to show cause why he should not take the money out of court, is discharged.

At a subsequent day, *B. H. Brewster* moved for leave for the Bank of Middletown to take the money out of court, the surplus having been raised by sales of the property in Lancaster county. This was opposed by *Mr. Gerhard*, who contended that the executions in Lancaster county had been prematurely issued. The court said, if the executions were irregular, the court from whence they issued ought to have been moved to set them aside; they were not void, and the sheriff could have justified under them; 4 Cranch 332. But time would be allowed to apply to the common pleas of Lancaster county; this was done, and that court refused to interfere, when *Mr. Brewster's* motion was granted and the money paid to the Bank of Middletown.

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IN THE QUARTER SESSIONS OF PHILADELPHIA  
COUNTY.

[January 31, 1846.]

COMMONWEALTH v. DICKINSON.

1. A prosecution for perjury alleged to have been committed in an affidavit of defence in a civil action, cannot be instituted until after final judgment therein.

PARSONS J.: This case comes before us on a *habeas corpus*, by which the defendant, William R. Dickinson, asks that we relieve him from the custody of his bail. It appears by the return, that he was prosecuted before an alderman of the city, for perjury, who required that he should give a recognizance for his appearance at court, in the sum of \$800, and his bail have arrested him, and were about to commit him, when this writ was sued out.

In order to sustain the prosecution, the counsel for the commonwealth have given in evidence the copy of an affidavit of defence, filed by this defendant in an action on the case, brought in the district court for the city and county, of Sept. 7th, 1845, No. 750, in favour of James H. Hart. This action it would seem, is founded on a promissory note for \$375, drawn to the order of Heber Chase, and indorsed by him and three others. A copy of the instrument was filed in the prothonotary's office, and the defendant on the 21st of November, 1845, filed his affidavit of defence, stating fully the grounds thereof, in pursuance of the act of 1835, and this prosecution was commenced in December.

On the hearing, but one question has been discussed, and it is this, that it appearing from the evidence adduced on the part of the commonwealth, that the alleged perjury was committed in swearing to the affidavit of defence, and the cause in which the affidavit was made, not having been tried or determined, this court will not suffer a prosecution like the present to be sustained, till there has been a judgment rendered in the civil action; upon the ground, that this court cannot but know all that is contained in the affidavit may be true. And the farther ground is assumed by the defendant, that there can be no trial in a

prosecution for perjury, until after *final judgment* in the civil action.

This question is one of considerable importance for the purpose of regulating the practice in prosecutions of this description; for we find it to be a very common thing in some parts of the country, when a prosecution is commenced for a misdemeanor, and sometimes for a felony, that the accused immediately after entering bail, institutes a prosecution against the complainant, and many, if not all his witnesses for perjury. But this is the first prosecution that has come before us, where the oath has been made in the incipient stages of a civil action.

The leading principle which must govern in this case, has been decided by three of the judges when holding the term for jury trials in the sessions. Before our court was organized in its present form, the president judge says, he decided that he would not suffer an indictment for perjury to be tried, until the prosecution, in which it was alleged the offence was committed, had been determined. Within the last year, a number of cases have come before judge Jones and myself, when holding separate terms, where there were prosecutions for perjury against witnesses, who had testified before the magistrate on the binding over; but the cause when they were to appear had not been tried; and we have invariably decided in accordance with the decision made by the president judge, before we came upon this bench. And have always determined, that no trial for perjury should be had, until the prosecution, where the individuals thus charged, had testified, was ended. If the opinions thus uniformly expressed are correct, it appears to me they are decisive upon the question now before us.

As the present case has been discussed with much ability by the learned counsel engaged, we have taken time to examine the subject with considerable care and attention, and I believe the opinion above indicated is fully sustained by authority.

The case of *Rex v. Simmons & Carrington*, 1 Payne 50, seems to be full to the point. It arose on an indictment for perjury, and an application was made for its postponement, on the ground that there was a rule for a new trial pending in the cause, on the trial of which, it was alleged the perjury had been committed. On the argument it was stated by counsel, that it had been the uniform practice of the later recorder of London,

Mr. Knowlys, never to try a case of perjury while the cause out of which it arose was in any way undetermined. Parke baron, observes: "This case must be decided according to the practice stated on the one side, and not denied on the other." And ordered the trial on the indictment to be postponed. The reporters in a note remark, that the reason for this practice as they understand it is, that so long as the case is undecided, the plaintiff and defendant, who might be witnesses on the trial for perjury, have a direct interest in giving their evidence, which they would not have after the case was finally decided.

Other reasons perhaps equally forcible might be given. It would be important to show, that a trial of the cause was had in which the witness had been examined, and the best evidence of it would be the production of the record; and this has been held essentially necessary; 1 *Strange* 162. It was upon this principle, the case of *Respublica v. Graff* was decided; 2 *Yates* 479. Where on a trial in the supreme court at nisi prius, the prosecutor had neglected to bring up the record from the quarter sessions, where the cause had been tried, in which it was alleged the offence was committed, the failure to produce it on the trial was held fatal.

And there seems to be a fitness of things in requiring that when one is indicted for perjury for testifying as a witness in a cause, that it should be finally determined before an indictment for this offence is tried, and it would seem from the character of the offence, it is indispensably necessary that such should be the state of facts before the prosecution could be sustained.

One of the requisite circumstances on which to found the prosecution is, that the evidence given by the witness was *material* to the question depending, as well as false. How is the materiality of the evidence, or its bearing to be ascertained, until after the cause has been decided? For although the statement made by the witness may be utterly false, yet if it was immaterial to the issue before the court, it is not perjury in the eye of the law, whatever may be the moral turpitude of the offence. This position seems to be conceded by the counsel for the prosecution; but it has been alleged, the present complaint is not against a witness who has testified, but against a party in the cause, relative to an interlocutory matter; and it is likewise contended that the offence is complete, when the affidavit is

made and the oath taken. It is undoubtedly the law, that the perjury is complete at the time of swearing to the affidavit. See *Rex v. Hailey*, 11 Eng. C. L. Rep. 383. While such is admitted to be the law, I think it will be found to be an indispensable ingredient in the constitution of the offence, that the facts alleged in the affidavit *are material* to the question before the court. For we find it ruled in the case of *Rex v. Dunston*, 1 Ryan & Moody 109, that in an answer in chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer, the defendant was indicted for perjury. It was held, that the denial of the agreement, which by the statute of frauds was not binding on the parties, was immaterial and irrelevant, and therefore the defendant was entitled to his acquittal.

That the materiality of the matters contained in the affidavit to the question before the court for decision, forms the gravamen of the charge in a prosecution for perjury, it is believed no lawyer will deny. If so, how is the materiality of such statements to be ascertained, until after the court before whom the cause is pending, have made a decision upon it, or it is in some way ended by an order, judgment or decree upon the subject, peculiarly for their determination?

This important point, can in no way be ascertained till then; unless the criminal court before whom the indictment is preferred, undertake to decide upon the civil rights of the parties in the cause pending before another tribunal; and is one of the numerous reasons why the courts both in England and this country have so often postponed the trial of indictments for perjury. It was upon this ground that we have refused to try an indictment for perjury, while a criminal prosecution was pending against the individual who prosecuted the witnesses that appeared against him before the magistrate, to obtain his binding over. If such a practice should be tolerated, in many cases criminals would escape. Suppose one is prosecuted for a misdemeanor or felony, and bound for his appearance at court, and he immediately makes a complaint against the main witness for perjury, in swearing falsely before the magistrate; now if

we should suffer the indictment for perjury to be first tried, it would be indispensably necessary for the court to go into an examination of the guilt or innocence of the individual charged with the crime, and in so doing he has the benefit of his own oath, attesting his innocence; he closes the mouth of the main witness in the cause, and if he can get circumstances to corroborate his oath, he not only establishes his own innocence indirectly, but convicts the principal witness in the cause of perjury; so that when the trial comes on against him, the person who could clearly prove his guilt, is rendered incompetent by the oath and act of the party accused.

The mere statement of such a rule or practice shows its absurdity; and if we test its operation in civil cases, it will be found equally improper.

Now, for a criminal court to undertake the trial of a civil cause, and permit the party plaintiff, before his right had been adjudicated upon, to appear and swear that the defendant in point of law and fact owed him the debt for which a suit is brought, perhaps deny the validity of a receipt which he has given, and for a jury where the commonwealth in her sovereign capacity is the prosecutor, to settle the amount of indebtedness from one to another, in dollars and cents (for it might come to that in testing the truth of an affidavit of defence), would certainly be introducing a practice which has never yet obtained in Pennsylvania, and I am sure no correct, thinking man would say it was right. And the private counsel for the prosecutor admits, that the prosecution for perjury ought not to be tried, until after the civil action has been decided; but he contends, this defendant ought not now to be discharged, which leads us to the consideration of the subject as a question of practice.

Before however, commencing the examination of that question, I will notice a case not referred to on the argument, which without some reflection, might seem to have carried the rule farther than the cases which have been already cited. It is the case of *The King v. Boston*, 4 East 460. The defendant was indicted for perjury committed in two answers, sworn to by him in the court of exchequer, wherein he was defendant and one Briggs was complainant. Previous to that, Boston had brought an action at law against Briggs, to recover a balance of 80 guineas upon the sale of some cattle. Whereupon Briggs



alleging payment of the claim, filed his bill for discovery, also for an account, upon which an injunction issued. Boston in his answer denied that he ever did receive the sum of money as stated in the bill of Briggs to have been paid to Boston in part of the account. And in a farther answer, he denied that said Briggs' wife did count out and pay or deliver to him, Boston, cash to the amount of £84, or that he did receive or take away with him any such sum of money, on account of the dealings between them.

The original action and the indictment, came on to be tried at the assizes in Cambridge, and the indictment was entered for trial next before the action. No objection was made to the indictment being first tried, but the only question raised which brought the case before the whole court, was the competency of Briggs as a witness. And we can readily perceive, why the indictment might well be tried first. The bill in chancery was for a discovery in aid of an action at law, and that portion of it for an account, was only to render an account on oath of the amount of money the defendant in that action had paid on the claim in controversy between the parties. Consequently when the defendant in the bill denied all the allegations contained in it, the injunction was dissolved, and a final determination of the proceedings in chancery was then made. For when a bill is filed simply for a discovery, a denial of the facts alleged in the bill is conclusive. No testimony is received to contradict his answer—it is an appeal to his conscience alone. Nor can the plaintiff in the proceedings recover costs. He is seeking no relief, in consequence of the discovery, for if a bill of discovery, emphatically so called, contain a prayer for relief, it will be open to a demurrer to the whole bill. Therefore, in the case just cited, it is manifest the cause in which it was alleged the perjury had been committed, was entirely disposed of, and the dismissal of the bill was in effect a final judgment. From this view of the case of *Rex v. Boston*, it certainly does not vary the practice which seems to have been established by the courts in England.

If the indictment for perjury is not to be tried until after the action is finally decided, ought this defendant to be held to bail, or committed? In our opinion he ought not in this stage of the proceedings to be held to bail, nor committed in default of

bail. But it is said, if we once decide that we will not hold to bail while the action in the civil court is undetermined, many offenders against the law will escape. Such may be the result, and if it is, in our opinion the injury to individuals and to the community, by holding one to bail under the circumstances before us, would be far more extended, than the escape of a few who might be guilty. And besides, it is a very difficult thing for any one who has violated the law, to flee from its officers. For he can be reached in any part of this union on a requisition from the governor of the state, and in most of the countries with which we have much intercourse, on a requisition from the president of the United States, which seems to be a full reply to that objection.

But it has been asked in argument, what reason is there why one thus accused, should not be held to bail, or in default thereof, be committed? To our minds there are numerous objections to such a course of practice. We have decided that we will not try the accused until after the civil action is determined, hence if we commit such a defendant to jail, he is entitled to his discharge under the habeas corpus law, if not tried at the second term. And we know that the civil action would not be disposed of till after the second term. The trial of the indictment is not postponed at the instance of the accused, but by a settled determination of the court, and the counsel representing the commonwealth concedes the point, that the indictment ought not to be first tried. Hence it seems to me, it is in effect conceding that the accused should be discharged; for why commit him to prison, when we know he cannot be tried at the second term, and therefore the court is compelled by the act of assembly to release him. His cause is not continued at his request, but by the practice of the court, or rather by the law of the land.

Why then should we hold the defendant to bail? If the civil cause is warmly contested, as we may fairly conclude it will be, from the display before us, and admitting it should be pursued with diligence, it can hardly be terminated short of three or perhaps five years. For after the trial in the court below, it may go to the supreme court, the judgment reversed, and sent back for a second trial, and again taken to the court of last resort, causing a delay that no human being can foretell. Must

then a defendant be compelled every two months to enter a recognizance for his appearance at the court of quarter sessions, during all this period? when perhaps the charge is perfectly groundless. But will the matter stop here, and would one defendant only be the party who must give bail for his appearance? Suppose Mr. Dickinson, who most strongly alleges the truth of the matters contained in his affidavit, should go before a magistrate and make oath that Mr. Bela Badger, the complainant in this prosecution, has committed perjury, in charging this defendant with the offence alleged against him, and from his own oath, together with the other three gentlemen whose names are on the note, it is easy to see that it would be difficult for an alderman to refuse to bind Mr. Badger also, for his appearance to the sessions. Now if we take the ground assumed by *his* counsel, he would probably think it hard that he must appear every two months at a criminal court, until the civil action is finally determined; and the prosecution for perjury against Mr. Dickinson is tried; which controversies might last for the next seven years. It only requires to state the probable operation of such a rule when practically applied, to show that no community would long bear such a law, but would at once look to legislative aid, for their relief from such oppression.

But it seems to me, there would be still greater evils attending the adoption of the practice now contended for.

We would put the character and reputation of every man almost within the power of his real or pretended creditor. There has been a rule in the supreme court and in almost every court of common pleas in the state, requiring a general affidavit of defence, for the last fifty years; yet whoever heard of a prosecution for perjury before the cause was finally ended? But here is a local law, applicable only to the district court, requiring that in certain cases, the defendant shall file an affidavit of defence, setting forth the grounds thereof; which is only giving a statement of the facts on which he resists the payment of a debt, which he believes neither in law nor equity can ever be collected from him; and for a court administering the criminal law to say, that for every affidavit thus made, they will hold a party to bail for his appearance at the sessions, every term until the cause is ultimately ended, would be the means of bringing every defendant in a contested case in the district

court before us. For one can hardly suppose a plaintiff would bring a suit, unless he denied the defence alleged against his claim; hence he always has the defendant in his power, and is able to hold him to bail on his own oath and the corroborative facts; which would be the instrument of writing on which the suit is brought; and this would be generally sufficient to warrant a committing magistrate in holding a party to bail. And how many men would pay an unjust demand, rather than be thus vexed and harassed with a criminal prosecution? See also its operation upon strangers and merchants from abroad, who if they are sued, do not hesitate in honestly defending what they consider an illegal or unjust claim. But if the moment they are sued, they place the truth of their defence upon record, they can be arrested for perjury, two thousand miles from home, and perhaps committed to prison—their names associated with crime, carried to the four corners of the earth through the press; and the poisonous blast of detraction penetrating their own neighbourhood, and even their own families; what ruin and distress might be the consequence, no one can tell.

This much we may fairly conclude, that a few such cases would be calculated to drive men of business from our city, and induce them to seek some other place of trade, where laws so seemingly at variance with civilization did not prevail.

And if we test the effect of such a rule upon our own citizens, its operation is equally disastrous, and would too often be made the instrument of extorting money from persons which they were not legally or equitably bound to pay. In the affidavit before us, it appears there were three other notes given by other individuals for the same sum, and based upon the same consideration, which the affidavit alleges has utterly and entirely failed. If the facts therein stated are true, neither lawyer or layman could pretend that the plaintiff has the shadow of a claim upon this defendant, for the payment of the note. Suppose that those who gave the other notes were sued, and filed similar affidavits, and they should be prosecuted for perjury; one might be a professional gentleman just starting in business;—sensitive in the highest degree relative to his reputation, he might suppose the bare prosecution, for such an offence, would be sufficient to destroy forever his character, and blight all his cherished hopes of success in an honourable pursuit. Such a

man might be induced at once to pay the demand, no matter how unjust, rather than his name should be recorded in a criminal court. Another with an equally valid defence, might be actively engaged in business abroad, and rather than appear at two terms of a criminal court, he would consider it to be decidedly for his interest to pay a claim which he knew he could prove to be utterly unfounded. True it is, that no man should pay a demand which is unjust, simply because his alleged creditor chooses to prosecute him criminally; yet we do know, that individuals are often placed in such a condition, that they are driven to a choice of evils, which others might obviate. And this may be illustrated, by contrasting the cases supposed, with that of the present defendant. He alleges that all contained in his affidavit is *true*, and that he can prove it; if so, then he ought not to have paid the note, nor no criminal prosecution, nor none threatened, should induce him to pay money, to stop them. But a defence of such a prosecution might ruin an individual, surrounded with different circumstances, not having the ability or moral firmness to resist oppression. Such individuals would always be made the subjects from which to draw money by the crafty, subtle, speculating and merciless creditor. Hence the administration of the law should always produce the effect of guarding the rights of all, and be a shield for even the weakest member of the great family of mankind.

Without citing more instances to show the soundness of the rule of law which we have adopted, or spending more time to demonstrate that any other would be unjust to the community at large, it is deemed sufficient to say, that the judges who heard the argument, are unanimously of the opinion that the defendant ought to be discharged.

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## IN THE SUPREME COURT OF PENNSYLVANIA.

[January 19th, 1846.]

### COMMONWEALTH v. BURDICK.

1. The false assertion of possession of money on the credit whereof goods were obtained, is a false pretence within the act of July 12th, 1842.

This was an indictment under the act July 12th, 1842, § 21, pamphlet laws 345, which provides that "every person who with

intent to cheat or defraud another, shall designedly, by colour of any false token or writing, *or by any false pretence whatsoever*, obtain from any person any money, personal property or other valuable things, shall &c.," and it alleged that the defendant falsely &c. "pretended to &c. that he possessed a capital of \$8000; that said \$8000 had come to him through his wife, it being her estate, and that a part of it had already come to his possession—a part would come into his possession in the month then next ensuing, and that the remaining part thereof, he would be obliged to wait for a short time;" which was false, and by which he obtained goods. The 2d count stated the same allegation as to possession, and the means of acquisition. The 3d, possession of the capital simply. Defendant demurred.

*F. Wharton and Attorney-general*, for the commonwealth.

A similar question arose, under Geo. II. c. 29, to be found in 2 Russ. on Crimes 284, 296, and seq. with an abstract of decisions thereon. There are also cases in our own country. *People v. Kendal*, 25 Wend. 399; assertion of ownership of a herd of cattle; *People v. Conyer*, 1 Wheel. Crim. Ca. 448; pretence of being a person of wealth, S. C. 14 Wend. 396. Their statute differs from ours merely in extending to the obtaining a signature. *People v. Haines*, 11 Wend. 557, supports this. *Commonwealth v. Hutchinson*, 1 Penn. Law Jour.—pretence of wealth—nor have the judges been disinclined to enforce this rule of morality when sanctioned by the statute, *Rex v. Young*, 3 T. R. 98; *Rex v. Barnard*, 7 Carr & Pay. 784, was a false token at common law; *Id. v. Wickham*, 1 Adol. & Ellis 34. But the English cases under the statute above cited, which is identical, are full to the point; *Rex v. Henderson*, 1 Carr. & Marsh 328, defendant to be worth a specific sum; *Rex v. Young*, 1 T. R. 104, promise to share a bet never made; *Id. v. Wisemore*, 1 T. R. 104; *Id. v. Parker*, 2 Moody 1.

The precedent is from 3 Chit. Crim. Law 337; Arch. Crim. Pl. 275.

Defendant's counsel did not appear.

GIBSON C. J. The rule of the common law, that cheating in private transactions without affecting the public, must, to be indictable, have been effected by artful devices or false tokens, was found to be too narrow for the business of the world; and the English statute 20 G. II. c. 29, which has given place to the

7 G. IV. c. 92, § 53, was enacted to extend the limits of the offence. From these, our act of 1842, § 21, seems to have been taken, and decisions on the clause in the first, which declares it an indictable offence to get money, chattels or securities from another "by false pretence or pretences," or in the second, "by *any* false pretence," may advantageously be applied to cases here. The distinctions taken, under these statutes, between cases sometimes differing in almost imperceptible degrees, are nice and well founded; and though not authoritative here, may help us in attaining a sound construction of our own statute, which differs from either of its models very little in substance or in form. It would be a waste of time to pass those decisions in review, as they are collected and arranged in all the text books on criminal law; but it may be collected from them, that a professed intent to do an act which the party did not mean to do, as in *Rex v. Goodall*, Russel & Ryan 461, and *Rex v. Douglass*, 1 Moody Cr. Ca. 462, is the only species of false pretence to gain property, which is not indictable. These two cases, having been decided by the twelve judges, are eminently entitled to respect; but I think it at least doubtful whether a naked lie by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods, "by any false pretences *whatsoever*." Its terms are certainly more emphatic than those of either of the English statutes; but whether a false pretence of mere intent be within them or not, it is certain that a fraudulent misrepresentation of the party's means and resources, is within the English statutes, and *a fortiori* within our own. In *Rex v. Jackson*, 3 Camp. 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. Of the same stamp is the *King v. Parker*, 2 Car. & P. 825; but *Regina v. Henderson* and another, 1 Car. & Marsh. 183, is still more to the purpose. The prisoners falsely pretended that one of them was possessed of £12, which he agreed to give for his confederate's horse, for which it was proposed that the prosecutor should exchange his mare; and this was held to be clearly a false pretence within the statute. Now the defendant is charged in the indictment before us, with having wilfully misrepresented that he had a capital of \$8000 in right of his wife; that a part of it was already received; that another part would be received in the

course of a month; and that the residue would be received shortly afterwards: and if, as was said in *Witchell's case*, 2 East P. C. 80, a false pretence is within the English statute wherever it has been the efficient cause of obtaining credit, the false pretence before us is within our own.

Demurrer overruled, and judgment of respondent ouster.

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## IN THE COMMON PLEAS OF CHESTER COUNTY.

September, 1845.

MARY H. PHIPPS *v.* PHIPPS, SURVIVING ADMINISTRATOR OF J. PHIPPS, DECEASED.

1. The personal estate of a decedent, is the primary fund for the payment of his debts, and will, therefore, be applied in relief of an heir, whose estate has been sold, under an order of the orphans' court, for the payment of debts.
2. This doctrine is applicable as between heir and widow, in Pennsylvania.
3. A. died intestate, seized of real and possessed of personal estate, part of which was a bond, payable at the death of his mother. His real estate was sold, by virtue of an order of the orphans' court, for payment of the debts of the intestate, and the proceeds so applied. Afterwards his mother died. Held, that the heir of A. was to be subrogated for the creditors, in respect to the amount of the bond, and, consequently the widow of A. was not entitled to one-third of the sum absolutely, but only to the enjoyment of the interest of one-third during her natural life.

The following case was stated, for the opinion of the court.

Crosby Phipps died in September, 1832, intestate, leaving a widow and six children, one of whom was Joshua Phipps, and seized in fee of several tracts of land in said county.

After proceedings in partition in the orphans' court, two of those tracts were adjudged to two of the other heirs at the valuation, and other two, after refusal by the heirs, were sold by the administrators.

The whole amount of the valuation money of those adjudged, and of the sale of the others, was \$13,438 25.

One-third of this sum, \$4479 41, remained in the real estate during the life of the widow, and one-sixth of said third, \$746 57, was payable to the said Joshua Phipps at her death, and was secured to him by bond and recognizance on the tracts adjudged, and by mortgage upon the tracts sold in the usual form.



Mary Phipps, the widow of Crosby Phipps deceased, died in 1841.

The said Joshua Phipps died in 1837, intestate, leaving a widow, the above named plaintiff, and several children, and seized of considerable real, and possessed of some personal estate, besides the money coming to him at the death of his mother, out of his father's real estate as aforesaid.

Jesse Matlack and Elisha Phipps were his administrators, the former of whom is now deceased.

On the 4th of November, 1839, upon the petition of the said administrators of Joshua Phipps, the orphans' court ordered them to sell his real estate for the payment of his debts, and they accordingly sold the same for \$5129 52, and the sale was confirmed, December 9th, 1839.

The money due the said Joshua Phipps, out of his father's real estate, and payable at the death of his mother, was not included in the inventory of his estate; nor was it brought to the notice of the orphans' court in the application for the order of sale, not being supposed by the administrators to be then available for the payment of debts.

The said administrators of Joshua Phipps, settled their account of the administration of the real and personal estate, which was confirmed, September 5th, 1840, showing a balance in their hands after payment of debts of \$650, being proceeds of real estate.

Since the death of Mary Phipps, the widow of Crosby Phipps, deceased, the amount then falling due to Joshua Phipps out of his father's real estate, \$746 57, has been paid by those owning the real estate, into the hands of the guardians of the minor children of the said Joshua, but for all the purposes of this action, is to be considered as in the hands of the defendant.

The plaintiff claims to recover one-third of this sum, amounting to \$248 85.

The question for the opinion of this court is, whether she is entitled to recover the said sum as personal estate absolutely, or whether the said \$746 57 must not be taken to replace so much of the proceeds of the real estate, taken to pay debts, she to receive the interest only of the said \$248 85 during her life.

If the court shall be of opinion with the plaintiff, then judg,

ment to be entered in her favour for \$248 85. If otherwise, then judgment to be entered for the defendant.

*James* argued for the plaintiff.

*Darlington* for the defendant.

The following is the opinion of the court, delivered by

BELL, president: Though, perhaps, we have no adjudged case in all its features exactly like the present, there are to be found many analogous, ascertaining principles by the application of which, the question here presented is to be decided. The case stated calls for the exercise of the equitable powers of this court, in marshalling the assets of a decedent's estate, which, in the sense of courts of equity, means "such an arrangement of the different funds under administration, as shall enable all the parties having equities therein, to receive their due proportions, notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds. (1 Story's Eq. 527, § 558; Torr's Estate, 2 R. 252). This marshalling of assets most frequently takes place in favour of creditors, by specialty and simple contract, and legatees, special or general; but in a great variety of cases, heirs and devisees are also entitled to the benefits of this equitable doctrine and practice. In its application, it is to be taken as a cardinal rule, that the personal estate of a deceased constitutes the primary and natural fund for the payment of his debts, and that it must be so applied, unless it be expressly or by plain implication, exonerated and discharged by the will of a testator. (*Idem* 536, § 571; Mogg v. Hodges, 2 Ves. 52; Galton v. Hancock, 2 Atk. 424-25). Of course, then, in the case of an intestacy, this rule is of general operation, though modified in a few instances, by other controlling equities, not necessary to be particularly noted here; and in accordance with it, it is settled in England, that an heir of land descended, who has been compelled to pay a mortgage or specialty debt of his ancestor, is entitled to stand in the place of such creditor against the personal estate of the intestate, and to be re-imbursed out of that fund in preference to distributees, and this, though there may have been no personal covenant for the payment of the debt on the part of the ancestor. (1 Story's Ex'r. 537-8, and the case there cited; 2 Fonbl. Eq., b. 3, ch. 2, § 1; Cope v. Cope, 2 Salk. 449). Al-

though by the laws of Pennsylvania, lands are considered and treated as assets for the payment of all the debts of a decedent, simple as well as by specialty, yet as between heir and distributee, and even heir and general or residuary legatee of the personal chattels, the rule is the same. (Case of Keyzey, 9 S. & R. 71; *Martin's Ex'rs. v. Fry*, 17 S. & R. 426; *Watkin's Estate*, 3 Rawle 229). In the last case cited, although a testator had bequeathed to his wife all his personal estate of what nature or kind soever, without saying any thing upon the subject of his debts, the orphans' court, upon the application of the widow and other executors, refused to grant an order to sell, for the payment of the testator's debts, after acquired lands which had descended to his heir at law, but directed the personal estate bequeathed to the widow to be applied to this purpose; and this decree was affirmed, on appeal by the executors, by the supreme court, on the ground that as there was nothing in the will to indicate a contrary intent, the bequest must be taken to have been made subject to the law of the land designating personalty as the primary and natural fund for the payment of debts, (see *Morris v. Griffith et al.*, 1 Y. 189); and consequently, the widow took nothing under the bequest, but what remained of the personalty after the payment of debts. So here by the terms of the act of 8th April, 1833, under which this plaintiff claims the fund in dispute, she is entitled to but one-third of her late husband's real and personal estate, remaining after the payment of all just debts and legal charges; and as the personal fund is first applicable, it follows that, had there been a due administration of this estate, nothing would have been left of the personalty, which the plaintiff as widow, could lay claim to. It is not to be doubted, that if the bond belonging to the estate of the plaintiff's husband, due on the death of his mother, had been brought to the notice of the orphans' court, upon the application for its order to sell his real estate for the payment of his debts, the court would either have declined to interfere until that security was sold, and its proceeds applied by the administrators in discharge of the debts, so far as they would reach, or made a special order as to the future application of that fund when realized, in relief of the heir. But this not having been done, and the land of the heir having been applied in discharge of the debts, it follows, under the rule already indicated, that the heir

has an equity to stand in the place of the creditors, as to the personal estate, and to ask that this may be applied to supply, so far as it will go, the value of the real estate taken out of his hands; unless, indeed, there be some superior equity in the widow to forbid it. The order of sale made by the orphans' court on the application of the administrators, can no more operate to defeat the right of the heir, than would an execution issued at the suit of a creditor, by virtue of which the land of the ancestor was sold for the payment of the debts. In both cases, the conversion of the land into money, for such a purpose, is without the agency of the heir, and not within his control. Besides, if in this instance the orphans' court has been, by the omission of the administrators, induced to do what otherwise it would not have done, surely this cannot avail to create a right and interest in the widow to which, without it, she would clearly not be entitled, and thus defeat the clear equity residing in the heir.

Is there, then, any controlling equity in the widow, to defeat the equity of the heir *in toto*? I am at a loss to perceive any. It was argued, that immediately on the death of her husband, she acquired a vested interest in the fund in dispute, and the debts being paid, this interest cannot now be disturbed. But she is in no better condition, in this respect, than a distributee of the personalty. In fact, for the purposes of this question, she is to be considered as a distributee, having an equal and no farther or greater right, than the next of kin of the intestate. The statute by force of which she claims, puts her in this position in respect to the personal estate; and we have already seen that the equity of the heir to be substituted for the creditor, will prevail against a distributee. For the purpose of reimbursement, equity regards the debt as still subsisting, and subrogates the heir as creditor.

But although there is no equity in the widow, sufficient to defeat *in toto*, the claim of the heir upon the personalty in the hands of the administrator, yet she possesses a limited and restricted equity, which will operate to modify that claim. She, as well as the heir, took an interest in the real estate of her husband, namely, a life estate in one-third thereof. This interest has been sold, under the order of the orphans' court, and applied in the payment of the debts. But in marshalling assets, it is

always the object of courts of equity to satisfy every claimant upon the estate of a decedent person, so far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied in satisfaction thereof. (1 Story's Eq. 528-9, § 561; *Clifton v. Burt*, 1 P. Wms. 679, and n. 1). In settling the respective rights of these contending parties (the defendant being a mere stakeholder), the fund in hand is to be regarded as the proceeds of the real estate for which it is to be substituted. But of this the heir is entitled to the present possession and use of only two-thirds, the interest of the other third belonging, under our peculiar system, to the plaintiff, as widow, during life. Such an arrangement should therefore be made, as to secure the payment of this interest to the plaintiff, and thus the legal claims of all parties upon this estate will be satisfied.<sup>1</sup> But being of opinion that the plaintiff is not entitled to recover, absolutely, any part of the sum in the hands of the defendant, judgment must be rendered for the defendant, according to the terms of the case stated.

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## IN THE COMMON PLEAS OF LANCASTER CO.

[August, 1842.]

### MOLLISON & COLLINS v. BOWMAN.

1. In trespass against a constable for taking goods of A. under a warrant to levy on goods of B., it is not necessary that the plaintiff should call upon the defendant for a copy of his warrant, according to the directions of the act of 21st March, 1772.
2. This section of the act of 1772, is intended to protect the constable only, where the justice would have been liable, and where the officer has acted *strictly* pursuant to his warrant.

LEWIS J. This was an action of trespass against a constable, for taking the goods of the plaintiffs under a warrant, commanding him to levy upon the goods of Thomas B. and John Withers. The court directed a verdict for the defendant, with the understanding that the point upon which the cause turned, was to be fully considered on a motion for a new trial. It was held, that

<sup>1</sup> See the case of *Bloomfield v. Budden* (2 Dall. 183, S. C. 1 Y. 187), where widow, tenant for life, was permitted to take surplus of proceeds of land sold under a mortgage, upon giving security for payment of principal sum after her death to the creditors of her son, who was remainderman.

the action could not be sustained in the absence of a demand upon the defendant for a copy of his warrant, according to the directions of the 6th section of the act of 21st March, 1772. This instruction was given under the influence of a previous decision of this court, made in August, 1843; *Mullison & Collins v. Monahan et al.*, August term, 1843. The value of a judicial decision depends as much upon the ability and research of the counsel who argues the case, as upon the learning of the judge, and his opportunities for investigation. And where the judge is holding the court at a distance from his residence, and deprived of the means of consulting authorities, his opinions, hastily formed, on points suddenly arising, unaided by the researches of counsel, stand upon the footing of *nisi prius* decisions, and deserve but little consideration as precedents; *Best jr.*, 3 B. & Al. 330.

The counsel are always in the commendable discharge of their duty, when they furnish the court with the cases pertinent to the questions under investigation. As they generally have a knowledge in advance, of the points intended to be raised, a reasonable share of industry is all that is necessary, for the discharge of this important requirement of professional duty. A judge desirous of performing his duty with fidelity, will receive with thankfulness, and regard with attention, the lights thus furnished from the acknowledged sources of the common law. In making the proper acknowledgment for the clear and forcible ARGUMENTS which have been brought to bear upon this question, it is but just to remark, that the only DECISION which the researches of counsel have brought from the books, is that of *Osborn & Burkhart*, made by a court of co-ordinate jurisdiction, sitting in Philadelphia; *Osborn & Burkhart*, 1 Brown 343. The decision is imperfectly reported, and is neither authoritative nor directly in point, although it appears to have a bearing in favour of the defendant, and was allowed to have its full share of influence in producing the instructions which were given to the jury. Those instructions, we are now satisfied, are neither founded upon a proper construction of the act of 1772, nor in accordance with the general practice of the state. Under these circumstances, the correction of the error, and an adherence to the established landmarks of the law, are required by a sound administration of justice.

The act of 21st March, 1772, is almost a literal copy of the statute 24 G. II. c. 44. The English statute was in existence twenty years before our own was enacted, and has, by numerous determinations, which have been followed extensively in this state, received a construction from which we ought not upon light ground, to depart. The 6th section of our act corresponds almost word for word with the 6th section of the English statute. When it is considered that the language in both statutes is the same—that the objects to be accomplished were in both cases identical—that the law-makers in both countries speak a common language—and that the expounders of the statutes in England and in Pennsylvania, are governed by the same principles of the common law, we can perceive no reason why the construction of the act of 1772 should be different from that which the statute of 24 G. II. has received.

The English statute declares, that “no action shall be brought against any constable, &c., for any thing done *in obedience to any warrant*, &c., until demand hath been made of the perusal and copy of such warrant,” &c. But a careful examination of the whole of the 6th section will show that the object was to protect constables and other inferior officers, from suffering injury for acts done strictly in obedience to their warrants, by reason of irregularity, or want of jurisdiction in the magistrates. It has therefore been held that the statute does not extend to cases where the justice cannot be liable. *Esp. N. P.* 340. That delivering a copy of the warrant will not discharge the constable, unless the plaintiff has a right of action against the justice. *Sly v. Stevenson*, 2 C. & P. 464; *Bell v. Oakly*, 2 M. & S. 289. That the 6th section of the statute is intended to protect the constable only, where the justice would have been liable, and where the officer has acted strictly pursuant to his warrant, and is no protection, where the goods levied on are already under distress for rent. *Kay & Grover*, 7 Bing. 312. Where a warrant commanded the performance of certain duties *within the county of Kent*, the statute was no protection from an action for transactions *beyond the limits of the county*. *Milton v. Green*, 5 East 234. Nor is it a protection, where the action is for an *excessive distress*. *Sturch v. Clark*, 4 B. & Adol. 113. Nor where under a warrant to seize *sugar*, the officer took *tea and nails*. *Price v. Messinger*, 2 B. & P. 158. Nor where the

warrant was to seize "100 lbs. weight of cotton copps," and he took a *tin pan* and a *sieve*. *Crozier v. Candy*, 6 B. & C. 232. Nor where a constable arrests one man on a warrant against another. *Esp. N. P.* 340. Nor where he takes the goods of one person on a warrant, commanding him to seize the property of another. *Paxton v. Williams*, 3 B. & Ald. 330, 1820. And it is not material, that the right of property is doubtful, for in the case of *Paxton v. Williams*, which is in every material fact similar to the present, there was "much contradictory evidence" (*ib.*) touching the right of property; and the action was sustained without the demand of a copy of the warrant, although the officer was ultimately saved by the *limitation* prescribed in the 7th section of the act, which is similar to our own, and which extends its protection to all acts of justices and constables, if done in good faith "in the execution of their offices," (*ib.*) although not strictly authorized by law in the one case, or commanded by their writs in the other. In this respect, there is a marked difference in the language used in the two sections, and there has been a corresponding difference in their construction.

It is manifest from these reasons, that the 6th section of the act of assembly is no protection, where the warrant, if legal, would furnish no justification; and that this section of the statute, has no place where the injury complained of arises from an act which was not commanded by the writ. In this case, the process was perfectly regular, and such as the justice was authorized to issue. No action could be sustained against him. But the plaintiffs complain that the constable took their goods on a warrant, commanding him to seize the goods of others. If this be true, he is neither justified by his writ, nor protected by the act of assembly. The injury complained of, was not "done in obedience to his warrant," and therefore no demand of a copy was required.

The instructions given to the jury upon this point were erroneous, and a new trial is therefore awarded.

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[May 3d, 1845.]

THE NORTHAMPTON BANK FOR THE USE OF GIBONS v. WINDER.

1. There was judgment in trover against defendant by Northampton Bank, to the use of G. Rule by defendant to show cause why judgment shall not be paid in notes of the Northampton bank. Held, that the judgment was not a debt due to the bank, but a debt due to the *assignees or creditors*, and the rule refused.

LEWIS J.

The plaintiff having obtained a verdict in the court for trover, and judgment being entered thereon for the sum of \$2456 21½, the defendant moves for a rule to show cause why the verdict and judgment in this case, shall not be received in Northampton bank notes, and an order to that effect be indorsed on any *fi. fa.* that may issue. It appears that the Northampton bank, on the 9th of June, 1843, executed an assignment to John S. Gibbons of \$80,000 of the loan of the Lehigh Coal and Navigation Company, for the consideration of \$51,500, therein acknowledged to have been received. This assignment is attested by the president and cashier, and the corporate seal is attached, and the instrument is made in pursuance of a resolution of the directors of the same day. It also appears by another instrument of the same date, signed and sealed by Mr. Gibbons, and reciting the sale to him of the Lehigh loan, that he is to pay the Northampton bank, in its own notes, in drafts drawn by it, on the Western Bank, and checks of deposit, equal to the difference between what the bank has already received on said loan, and the par value thereof; that is, if he recovers the whole amount, he is to pay the whole difference, and for any portion he may recover he is to pay the difference between what the bank has already received and the par value of such portion—payable 90 days after such recovery and receipt. On the 13th of June, 1843, the Northampton bank made an assignment to trustees, under the act of 1842. The damages given in this action were for the conversion by the defendant to his own use of a portion of the Lehigh mortgage loan already mentioned, which had been hypothecated with him, under an agreement not to sell the same except upon default on the part of John Rice (the president of the bank), and ten days' notice thereof. The loan was disposed of by Mr. Winder in four days after he received it, and

without any default and notice as required by the contract, and for this act the damages were awarded. The Northampton bank notes are proved to be of no value whatever.

This motion is founded upon the decision of the court in *Irvine v. The Lumberman's Bank*, 2 W. & S. 200, and upon a provision in the act of 1842, relative to assignments by banks. The action brought by the Lumberman's bank was upon a note payable in its own notes, against debtors who had borrowed its money, and who upon the trial, after their own failure to pay their note at maturity, had contributed to the ruin of the bank and the consequent depreciation in the value of its notes, desired that the verdict should be rendered for the market value of the notes, and not for the sum which they had received. The court very properly held that the value as between the parties, was the full sum expressed in the note. And the supreme court in affirming the judgment, for the purpose of quieting the apprehensions of the debtors, that after judgment against them they would be compelled to pay in specie, made the remark that the court have control over the execution, and they will, under their equitable powers, take care *that no injustice be done*. Of course, it is the duty of every court to take care that its process shall not be used to effect injustice, but this remark must not be understood as sanctioning the principle that the court would in every case, or indeed in any case, allow of a sett-off of notes, which are but rights of action, against a judgment recovered. It is not usual for courts, under their equity powers, upon motion, to permit any demands, except those ascertained by judgment, to be set-off against each other. And the right to pay in specific articles under the contract, is certainly extinguished by the recovery of damages for the breach of that contract. The recovery of damages was payable in money, and neither courts nor legislature can make any thing short of it a legal tender. In the case of *Hallowell & Augusta Bank v. Howard et al.*, 13 Mass. Rep. 236, a motion to pay into court the depreciated notes of the bank, made before judgment, was denied, and although the demand had in that case been assigned, the court remarked that if the assignment were out of the question, the motion would not obtain. The bills of a bank, although dated before suit brought, are no set-off in an action brought by it, unless shown to have been in the defendant's

hands prior to the suit. *Jefferson County Bank v. Chapman*, 19 Johns. 322. A set-off on motion is not a strict right at law, but is *ex gratia curiæ* in courts of law, and will not be permitted where the demand proposed to be set-off is not ascertained by judgment—where the facts are complicated and intricate—or where the equities are equal. 14 Johns. 63; 3 Bibb 233; 3 Cowen 126; 2 Watts 228.

In this case it does not appear that the defendant, Mr. Winder, had the possession of any of the notes of the Northampton bank at the time suit was brought, or that he has any of them at this time, so that the application may be considered as a motion for leave to purchase them at their present depreciated value for the purpose of paying the judgment. The equity of Mr. Gibbons, the purchaser of the claim on which the suit is founded, is interposed. The fair construction of the two papers produced is, that the claim was sold to him in consideration that he was to incur all the expenses of a lawsuit for the recovery of the property; and all the liability for costs of the adverse party if the suit failed, and that in case of recovery, the difference between the sum already received and the par value of the loan, was payable in claims against the Northampton bank. It does not appear whether Mr. Gibbons had claims against the bank, at the time of the contract, which he was desirous to secure or not, but if he had, his equity would undoubtedly be of the purest character, and higher than any arising from subsequent acquisitions of claims by the defendant. Be that as it may, however, the consideration which is implied from the contract, (to wit, the expenses and trouble of the lawsuit) gives him a right to the advantages of the bargain, and vests in him the right to the property sold, and consequently to the value of it as ascertained by the verdict. It is not pretended that actions of tort can in general pass by assignment—but such of them as depend upon the value of property and would on that account pass to executors or administrators, may pass in equity by any assignment which would transfer the property itself. It has been seen that where the equities are equal, the court would not interpose for the purpose of depriving either party of his lawful advantages, but in this case the equity of Mr. Gibbons is much higher than that of the defendant. It is through his exertions

alone that the money has been recovered, and to give the defendant his motion, would be to allow him all the benefits which were secured to Mr. Gibbons by his contract with the bank, as the compensation for his services and expenses in prosecuting the suit.

The contract with the bank is not forbidden by any principle of the common law in force in this country. It is such as is sanctioned by long practice, and the uniform habits of the people. But for the sake of the argument, it may be conceded to be illegal and void. In that case, the claim against Mr. Winder would belong to the assignees under the act of 1842, by virtue of the assignment of the 13th June, 1843. There is a provision in the act of 1842, which requires that the assignees under that act "shall receive in payment of debts due to said bank, its own notes and obligations and the checks of its depositors at par." 2 Str. 1234; 14 Petersdorf 424; 6 S. & R. 57; 20 Johns. 137; 8 S. & R. 124; *ib.* 425. So far as this clause secured to the debtors of the bank the advantage of paying their debts in such claims against it as they had taken in the course of their business, before the assignment, it is in accordance with justice and law; but so far as it may be supposed to give to the debtors of the bank, whose non-performance of their obligations contributed to the depreciation of its paper, the advantages of determining what claims against the bank should be paid, or of purchasing the paper at a discount, and thus consuming *all the assets*, while holders, who could not afford to sell at a loss or were unwilling to make the sacrifice, were to be deprived by this process of even a *pro rata* distribution of the assets which the bank actually possessed at the time of assignment, it is certainly against that equality in distribution, which is the favourite doctrine in courts of equity. The right is one strictly legal, and not only destitute of equity, but positively against the plainest dictates of justice. It is therefore not to be extended by construction, to cases not within the plain language and meaning of the legislature; nor are the equity powers of the court to be roused into action to use extraordinary measures to secure it to a defendant, after he has failed to pay in the currency proposed, after damages have been recovered from him by reason of his refusal, and after he has had a full trial and

has no longer a day in court, by which, according to the regular course of law, he may establish his claim.

The fair construction of this provision of the law is, that the debtors would stand, after the assignment, as if their notes to the bank were made payable, by the terms of the contract, in the notes of the bank. Surely this was all that was intended. If a debtor would not avail himself of the privilege of paying in specific articles according to the contract, he could not tender the articles after judgment, in satisfaction of the damages recovered for his breach of contract. So, under the act of 1842, if a debtor did not avail himself of his privilege, and damages were recovered from him for the breach of his contract, he had no day in court to plead his payment of specific articles, and the damages, it is conceived, would be payable in money. Be that as it may, however, it could never be intended to apply to any but *debts* due to the bank before assignment. Cowp. 57; 2 Cr. 344. The recovery in this case is not for any *debt*, it is for a *tort*. The defendant was not a debtor of the bank at the time of assignment, and is not within the favoured class who were entitled to the benefits of this extraordinary provision. If the question had been put to the members of the legislature, whether a man who had the care of the assets of the bank, in trust for the bank, might, under this provision in the act, convert them to his own use, then pay their value in the worthless notes of the bank, and thus deprive every creditor who would not sacrifice his claim, of every dollar of his demand, the answer can readily be imagined. Such a proposition would have shocked the sense of justice of every man in the legislature. And yet it is identical in principle with the one before the court. The defendant held a portion of the assets of the bank in trust. He converted it to his own use without authority, and instead of paying the value to the assignees, to be distributed *pro rata* among the creditors, he proposes to pay the value in notes admitted and proved by himself on the trial to be worth less than the paper on which they are made. If this principle be sanctioned, what is to prevent the president and cashier from converting all the assets of a bank to their own use; and when their own proceedings have ruined the institution, and driven it to an assignment under the act of 1842, what is to prevent them from making profit by their own wrong, and

making satisfaction in the paper of the bank, thus rendered worthless to every other person by this improper conversion? Such a proceeding was never contemplated by the act of 1842. It is only "*debts due to the bank*" which are payable in its notes. This was *property* owned by the bank, and not a *debt*. It is true it has become a debt by judgment—but it is a debt due to the *assignees*, or due to the *creditors*, and not within the meaning of the act.

For these reasons the rule must be discharged, whether the contract with Mr. Gibbons be legal or otherwise.

*Rule discharged.*

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#### "THE LATE JOHN WILLIAM SMITH, ESQ.

"We are unwilling that the death of this lamented gentleman should simply stand recorded in our pages, without a brief testimony to his fame as one of the most accomplished lawyers of our time. He was of a respectable Irish family, and completed his education at Trinity college, Dublin, the venerable establishment which not only supplies the learned and eloquent ranks of the Irish bar, but contributes also to the bar of England some of the foremost amongst its members in reputation and in promise: witness at present the names of Martin, Crompton, Murphy, Willes, Hugh Hill. Others might be added. Mr. Smith, after passing through the university with eminent credit, graduated in the year 1829, and obtained the highest distinction the university of Dublin has to bestow—the classical gold medal. Shortly afterwards, he established himself as a pupil in the well-frequented chambers of Mr. Blick, and in Easter Term, 1834, was called to the English bar, and joined the Oxford circuit, by the members of which his learning and talents were universally honoured.

"His great mental endowments were not set off by any corresponding external gifts. An inharmonious voice, somewhat unprepossessing features, and a *hardness* of manner not well suited for *nisi prius* business, probably, in some degree, prevented him from getting into full practice on the circuit, although, before the decline of his health, he had begun to be

pretty largely employed in the heavier class of causes. But, before the court in banc, his rich and sustained stream of legal reasoning riveted the attention of professional hearers, and overcame all external defects.

“So early as the year 1834, Mr. Smith published his ‘Compendium of Mercantile Law,’ an accurate and well-digested epitome, highly esteemed by the profession, (as is evidenced by its having passed through three editions), and second (perhaps) in excellence only to the series of papers on mercantile law—still, unfortunately, incomplete—which were published in the ‘Law Magazine.’ In 1837, the first edition appeared of his ‘Selection of Leading Cases, with Notes,’ a work too well known, and too largely appreciated by the profession, to render it necessary that we should record our adjudication of its merits. The beautifully-reasoned dissertations upon all the leading doctrines of our municipal code, on pleading, evidence, estoppel, covenants, the law of bailments, of carriers, of negotiable securities, of marine insurance, stoppage in transitu, bankruptcy, the statute of frauds, &c. their felicitous criticism on decided cases, their admirable elimination of legal principles, are familiar to all our readers. The author at once acquired, by the publication of this work, the highest reputation as a lawyer. But his legal learning, though by these means more generally known, in no respect transcended his other intellectual attainments. An accomplished linguist, familiarly conversant with both the ancient and modern classics, embracing, in short, within the range of his acquirements, an extent of knowledge of which few, indeed, of the students of our *easy-reading* age have any notion, it may well be supposed that his conversation, when, amongst his intimate acquaintances, all these stores were opened, was of a most attractive order. Lord Coke’s memorable advice, ‘*Petere fontes quam sectari rivulos*,’ which Mr. Smith chose as the motto for the title-page of the ‘Leading Cases,’ was by him applied to every department of knowledge, as well as to the law.

“It had been obvious, for some years past, that the insidious disorder which is the plague of our climate was gradually undermining his constitution, although, for a considerable time, his medical adviser retained the hope that the disease had not reached his lungs, and that it might yet be overcome. He

died, however, entirely worn out, on the 19th of the present month in the thirty-eighth year of his age.

"We will only add to this brief notice, that, in private life, Mr. Smith was a very estimable and amiable man, and that his friends regard his memory with warm attachment."

We have copied the above notice from the *London Jurist* of December 27th ult., with the deepest regret. Few men at the English bar possessed more of the elements of eminent professional success than Mr. Smith; endowed with a mind originally acute, clear, close, exact and thorough, the course and discipline of the Dublin university perfected its powers. The value of Mr. Smith's "*Leading Cases*," the book by which he is most favourably known, has been shown by the publication of two editions in this country; the second enriched with notes applicable to American law. Few law books have been published of late years which have given so much instruction to the profession, or which have been so generally and satisfactorily used as this learned and laborious book of Mr. Smith's. It does not seem improper when the estimable and promising men of our profession die in England, that a passing tribute should be paid to their worth and talent. United, as we are, so closely by the bond of a common pursuit—reading as we do so many of the same books—guided by so many of the same great legal lights—as the members of the English bar,—professional worth there, should not pass unnoticed here.

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## A LECTURE

*On the Practice of the Law pertaining to the Sheriff's Office, delivered before the Law Academy of Philadelphia, on the 14th January, 1846. By WILLIAM A. PORTER. [Published by resolution of the Academy.]*

### GENTLEMEN OF THE LAW ACADEMY:

Much might be said of your society, without exaggerating its influence. Unlike most other associations, the destiny of those thus associated, is an employment on the same general subject, and a round of the same professional labour. It is obvious that ideas, if correct and useful, operating under so many different circumstances, for the production of the same results, during so long a period as our collective lives will probably embrace, must acquire a potency for good, beyond the reach of the most vigorous imagination. This is doubtless the principal element of strength, which combinations of individuals for common objects possess; much increased, when these objects are of a literary or scientific character; and still more augmented, when directed to the acquisition of knowledge, in a distinct department of science.

Not wholly unmindful of these sentiments, it has appeared to me, that I might best discharge the obligation under which your kindness has laid me, on this occasion, by aiming at practical usefulness. Whatever opinions our academical educations are calculated to inspire, we usually travel but a short distance

on the great highway of life, before conceiving a proper estimate of practical men. In the whole universe of matter, it is doubtful whether there be any matter so utterly helpless and useless, as a man of theory, without practical ability. While practice, of itself, is incapable of accomplishing much, eminently great or lasting—theory, without practice, is, at the best, valuable only as a subject for the amusement and recreation of the minds of others; a use, to which, observation will show, it rarely fails to be converted. It is emphatically the practical man that is wanted in this world, at its present stage. The great test of any machine, animate or inanimate, may be safely pronounced its capacity to act. Apart from this, there are no means to decide, whether it have any degree of ability; while practical skill is the sure guarantee of a certain measure of knowledge. In this, as in most other instances, it will be found that the general judgment of men, fully expressed, is not greatly at variance with truth and reason. It is matter of common observation in professional life, and one that has not unfrequently caused surprise to those who supposed themselves its victims, that accomplished and well informed persons, will infinitely sooner entrust business to mere men of practice, of whose learning they know nothing, than to those whom they have every reason to believe most firmly grounded in the principles of their professions, but of whose practical ability they have no good evidence. They infer the presence of skill in the practical man, because he is able to act; they doubt that of the merely theoretical, because they suppose it must, if of the proper kind, exhibit itself in action; and they will not, as a consequence, commit character or property, to the care of anything but practical ability.

These considerations alone, ought to render every man, who is anxious for professional reputation and emolument, sedulous in acquiring an intimate knowledge of the *practice* of his profession. If these do not, necessity will. The personal inconvenience he will otherwise suffer; the mortification of being defeated by men his inferiors, in every respect, save that of practical acquirement, in instances where his cause is entirely just; and the loss of self-reliance and reputation consequent upon this; will, as certainly as he is composed of any penetrable

stuff, have the effect of infusing into him, a more just estimate of the immense power of practical knowledge.

In directing your attention, as I propose, in accordance with the desire of your association, to the Practice of the Law, pertaining to the Office of the Sheriff, it might be interesting, but it is not apposite to my plan, to dwell upon the history of the office. Premising that I speak only to the student and the junior practitioner, I design mainly to sketch, in a cursory manner, the practice of the office as at present pursued in Pennsylvania; to intermingle an occasional remark upon points of law, settled or undecided; and to present for your consideration, such counsels, as observation and experience have suggested to myself. In executing this plan, somewhat must depend on condensing without obscuring,—on detaching a part, without marring the harmony of the whole,—on striking the line between what is common-place and what is instructive. If, without pretending to advance any thing original—for I know not that on such a subject, originality of views is at all desirable—I shall succeed in imparting to any persons less acquainted with it, some just idea of this part of the practice of our profession, and thus save their time, facilitate their progress and advance their interests; or in placing in a fuller light the duties and responsibilities of the office, and thus render its administration more regular, more safe, and more agreeable; there will be no object of mine left unaccomplished.

Permit me to remark, that as a member of a court of justice, the sheriff's duties are somewhat various. He brings the defendant into court. He assists in selecting and drawing, and afterwards summons, the jurors, who are to try the issue. If, from any cause, the panel be exhausted, he supplies it anew. In England, if required, he is obliged to provide with suitable lodgings, the judges who try the cause; in this country, he is at present happily relieved from that duty; for I do not know that our own judges are, from their high standing, any less fastidious as to where they shall lie down;—how long, he may continue exempt from such necessity, depends, perhaps, on future legislative action, in respect to the salaries of these distinguished officers. During the trial, the sheriff preserves the order of the house, and when parties become refractory, he takes the offending individuals under his more particular charge—an act of

kindness which, with genuine liberality, he extends indiscriminately, to client and counsel. If a witness refuses his attendance, the sheriff goes in quest of him, with his attachment. If fines are imposed, he collects them. When the jury retire for deliberation, he accompanies them. When the verdict is rendered and judgment entered, he carries it into effect, by execution, in the several different forms. If the case be a criminal one, he is required to keep the defendant safely until the day of trial; to produce him in court on the day; to convey him to his place of confinement, if imprisonment be the sentence; or if he be condemned to death, to inflict upon him that extreme penalty of the law: a humane and agreeable kind of service, for which, it may be noted, our act of assembly, considers the officer fully compensated, by the fee of *twelve* dollars which it prescribes.

The first duty incumbent on the sheriff, after receiving a notification of his election or appointment, is to give a bond and a recognizance, with two sureties, in the form prescribed by the act of assembly: approved, first by the court of common pleas, and afterwards by the executive of the commonwealth. His commission then issues under the seal of state; he is sworn into office by the recorder of deeds; and his commission recorded by the same officer. Before the recording of the commission, he is prohibited from doing any official act. When the recorder of deeds has taken the recognizance, he certifies it to the prothonotary of the common pleas; from which time, it operates as a lien on the real estate of the recognizers, in the same manner as a judgment entered in a court of record. Formerly, this lien was unlimited both in duration and extent; but by later enactments, it has been thus restrained. If the sheriff is worth the sum claimed, suit is, in practice, usually brought against him alone, for any damage occasioned in the execution of his office; if he is not, or if a judgment thus obtained, is, from any cause, not satisfied, the action is instituted against him and his sureties, or either of them. If brought against the sureties, it must be commenced within five years from the date of the obligation, or the courts cannot sustain the action. But it is only necessary that it be commenced within this period, not that it be prosecuted with diligence; for when once upon the docket, it may lie an indefinite time. The best form in which a *præcipe*

may issue, in such an action, is as follows: *The commonwealth of Pennsylvania at the instance of A. B., who suggests himself as plaintiff in this action, against C. D., sheriff of the county of* and *E. F. and G. H., sureties of the said C. D.*: though it will not be error, if the name of the party, for whose use the suit is brought, be omitted. On the trial of the cause, a copy of the instrument, certified by the recorder of deeds, is received in evidence, with the same effect as the original. The record of the previous judgment against the sheriff is then offered in evidence, if such a judgment have been obtained; if it have not, the facts and the damage thence arising are proven in the ordinary mode. But this previous judgment against the sheriff, is not conclusive against the sureties, as to its amount, where they have not been notified.—If judgment be rendered against them, it is entered first, for the commonwealth in the amount of the bond, and for the plaintiff in the amount of damages, which the jury shall find he has suffered, together with costs. The judgment entered for the commonwealth, remains for the security of those entitled to the benefit of the obligation, who may proceed by *scire facias*, issued upon it, to assess and recover their damages.

It may admit of question, whether there is not something defective in the legal provisions, relating to this bond and recognition. The amount in which the bond of the sheriff of Philadelphia county is required to be taken, is \$80,000; and this may serve as a fair example. To secure this amount, the court of common pleas will usually require unencumbered real estate of the value of at least \$150,000; with the design of preventing the property from falling below the amount of the bond, when bought, in any state of the country, under the hammer of the auctioneer. This amount and this kind of security, are such as few men are able to give; it is not common to find so large an amount of property, in the hands of any man willing to execute the duties of the office; fewer have friends both able and willing, not only to subject property of this value to such risks, but to encumber it in such a manner, as to be unable, for five years afterwards, either by mortgage or sale, to accommodate it to any mutation of the times, or of their own circumstances. View it as we may, it must be confessed, without intending to pander to any species of radicalism, that the office

is thereby placed beyond the reach of the greater portion of those competent to fill it. The practical consequence is, the officer may be compelled, in order to obtain the required security, to commit its control in some measure to his sureties, and thus, perhaps, subject the public to rapacity and insolence, for, or against, whose elevation, they have not enjoyed the poor privilege of casting a vote. In this, would seem to be argued, some defect: what may be the remedy, or whether there be any remedy, it is not here intended to consider.

I have said, the sheriff brings the defendant into court. The writ for this purpose, is taken from the prothonotary's office, and placed in the hands of the sheriff, or left in his office, by the plaintiff or his attorney; the fee allowed by law, for its service, is paid to the officer or his deputy; proper directions are given for finding the defendant; and, if required, for serving the writ. From the time he receives it, until he returns it to the prothonotary's office, with his return endorsed, he is wholly responsible for it. In the execution of a writ thus placed in his hands, he is required to employ the highest possible degree of promptness and care; if he fail to do so, he will, in most cases, soon come to a knowledge of this principle, and the reason on which it is based, by experiencing some of the consequences which flow from it;—a sort of *practical* knowledge, of which, as I have already remarked under that head, I trust you will indulge me, if I delay not now, to say anything in praise. If the process be erroneous, or voidable, or irregular in form, provided it bear the proper seal, and the court has jurisdiction, he is nevertheless bound to execute it. Into the question of jurisdiction, he must invariably inquire.

If the writ be a *capias*, he must take the defendant into actual custody, and retain him in such custody, until discharged by an order of court, or delivered to his successor in office. In making an arrest, care should be taken that the defendant be sufficiently designated; as a mistake in the identity of the person, might prove of disastrous consequence to the officer. The defendant should also be described by his proper name; for in certain kinds of process, if he be arrested by a wrong name, he may maintain suit for false imprisonment against the officer, or any one interfering in the arrest. In making an arrest, the sheriff may summon to his aid, as many of the citizens as are

necessary, and may, generally, use as violent means as are necessary, to enforce the command of the writ. In searching for him, he may not break open the outer door of the defendant's dwelling; if so, he will be guilty of a trespass. Having once passed that door, he is at full liberty, after a demand for admission, to break open or cut down, all other obstructions that oppose him in performing his duty. If he be a known deputy officer, it is not necessary that he should exhibit the authority, on which the arrest is made, even if the defendant demand it; but if he have been specially appointed for the occasion, it is necessary. If the defendant be privileged from arrest, the sheriff may refuse to arrest him; but in doing this, he subjects himself to the risk of an action, in which the plaintiff may show the claim of privilege to have been unfounded, and thus recover. When several writs against the same defendant, have been lodged with the officer, which frequently occurs in practice, an arrest upon one, is an arrest upon all; and in actions for an escape, the plaintiffs in such other writs, may set forth that the defendant was arrested under theirs. When arrested, he may be discharged, by giving bond to the sheriff, with sufficient sureties, in the sum previously indorsed on the writ by direction of the plaintiff's attorney, conditioned for his appearance at the return day, &c.,—which bond is attached to the writ, and returned with it to the prothonotary's office. For any breach of the condition of this instrument, the plaintiff may institute his action in the court from which the original writ issued.—In lieu of bail, the party arrested may, by our act of assembly, deposit with the officer, a sum of money, which remains in his hands as security, until the termination of the suit. When money or reasonable personal security is thus tendered, the sheriff must accept it, and discharge the prisoner. If he refuse to do so, he incurs the hazard of an action against himself.

An alteration has occurred in a point of practice, relating to this subject, to which it may not be uninteresting to direct your attention. Upon receiving a notice of the bail taken by the sheriff, the plaintiff may except to their sufficiency, by filing such exception with the prothonotary, and notifying the defendant and the sheriff to that effect; whereupon the bail, at an appointed day, appear in court and *justify*, or prove their suf-

iciency by their oaths. If found insufficient, other bail may be added. For several years subsequent to the passage of the act of 1836, which contains these provisions, it was the practice of our courts, not to allow a rule upon the sheriff to bring in the body of a defendant, where the bail were thus excepted to, and not perfected; but to compel the plaintiff to seek redress by an action at law, for any injury thus occasioned. In the case of *Fitler v. Bryson*, 6 Watts & Serg. 566, the supreme court have overturned this practice, and established the very different doctrine, that (if he has not proceeded in the original suit, nor been guilty of laches), the plaintiff may rule the sheriff to bring in the body of a defendant thus let to bail, and, consequently, may attach him for a disobedience of the rule. With every sentiment of respect for that tribunal, it may be doubted whether they have, in this decision, promulged a doctrine, either useful in practice, or sound in principle. Considering the immense risks to which it exposes the officer, it would seem to require the support of the most conclusive argument, or the most imperative necessity; for observe, that, although he has but yielded obedience to the command of the writ, he is thus placed in a situation, from which no fidelity, however exemplary, can relieve him. Between the period of taking the bail, which, let it be remembered, he is under penalty of heavy damages, compelled to take, and the time at which they are rejected by the court as insufficient, it may become impracticable, by reason of the defendant's voluntary absence, to obey the rule, for whose violation, he is to be fined or imprisoned. For complying in exact terms with the command of the writ, namely, letting the defendant to bail, he may thus be compelled to pay, not a sum of money to the plaintiff, to whom, by the terms of the act, he is responsible, but a fine to the commonwealth, for a contempt of its process.

But a writ of *capias*, is, in the present state of our law, by no means common. The greater number of actions, if we except the *scire facias*, which partakes of the nature of a summons, are commenced by *summons*: which, although it contain an express command to appear, is simply a notification to the defendant, that a suit has been commenced against him. It is executed by the sheriff, by reading it in the hearing of the defendant; or by giving him notice of its contents, and giving him a true



and attested copy thereof; or by leaving such copy at his dwelling house, in the presence of one or more adult members of the family. The return of the officer must show, that the requisitions of the law have been, in every respect, strictly complied with. A return that a copy has been left at the defendant's place of residence, will not authorize the entry of a judgment. But it is a good service, when the writ is read to the defendant, but no copy left with him. The copy must be *attested* by the officer, or his deputy; that is, must be signed by him, in testimony of its correctness, as a transcript of the original; and unless it be so attested, the court will, on motion, where an absolute appearance has not been entered, set aside the service, and compel the plaintiff to commence anew. A summons cannot be issued on the return day, but when issued previously, may be served at any time before, or at any hour during, that day.

Each of the several actions may be commenced by summons; and the mode of service is, with few exceptions, the same in all. The writ of *replevin*, which contains in substance, a clause of summons, is the only one whose service warrants particular remark. In this writ, beside that clause, the sheriff is commanded to replevy and deliver to the plaintiff, certain goods therein named and valued, provided, that before doing so, the plaintiff make him secure against loss. This security is, in practice, a bond in double the estimated value of the property, with one surety or more, conditioned that the plaintiff shall prosecute his writ with *effect*—which means with *success*—shall make return of the goods, if return of the same be adjudged, and shall, at all times, keep harmless the sheriff and his officers. This bond is taken by the sheriff in his own name, after the writ has been lodged with him. It is not accompanied with warrant of attorney, to confess judgment; and although it would be highly convenient and tend much to his security, I know of no law or practice that would authorize the demand for such a warrant. Of the sufficiency of the obligors, as the sheriff incurs the risk of executing the writ, so he is constituted the judge: but if reasonable security be tendered, he cannot refuse to proceed. If the security offered, be satisfactory, the goods are seized in obedience to the command of the writ. If a claim of property in them is made by the de-

fendant, the sheriff must allow a reasonable time to elapse, before removing them, to afford the claimant an opportunity to prepare and tender what is usually called a *property bond*; and unless such time be allowed, the officer cannot justify under the writ in an action of trespass, brought against him for seizing the goods. In ordinary cases, the time spoken of, is about forty-eight hours; but this rests in the discretion of the officer. In the last mentioned bond, the defendant and his sureties oblige themselves by a penalty, to deliver to the plaintiff, the goods in question, if they shall be adjudged to him—to abide the judgment of the court in all things—and to keep the sheriff harmless. Before this bond can be safely received, the work of minute personal examination must again be performed. If the security thus offered be satisfactory, the goods are permitted to remain with the defendant; if not, they are delivered to the plaintiff.—Though originally intended by the law, as the remedy for an unfounded distress, this action may be safely pronounced the grand source of *distress* to all sheriffs. For the sufficiency of the security thus taken, the officer is absolutely responsible. When it is considered how short a time is allowed him to make inquiry, concerning its character; how limited are his means of correct information; how long a period may elapse, before the replevin suits themselves are determined, and consequently, before suits can be instituted on the bonds; what changes may occur within that time, in the circumstances of sureties perfectly good when taken; and how inadequate must be a security, which gives no lien on property, real or personal, especially in a mercantile community; the immense risk which the sheriff is thus compelled to bear is, in some degree, apparent—a risk for which few advantages yielded by his office can fully compensate, and against which, no personal inconvenience, no prudence, industry or integrity, can entirely guard.

It were cordially to be wished, I think, that some legislative provision might be made, calculated to relieve the sheriff of the weight of this vast responsibility. I know no mode better fitted to effect this object, than that suggested by the commissioners appointed to revise our civil code: a mode, as we know, not altogether original with them. In the bill presented by them to the legislature, it was, in substance, provided, that in all actions of replevin, the cause of action should be verified by

oath or affirmation, before replevying the property ; which, considering the importance of the action, and the practice prevailing in other actions not more important, must be considered as highly desirable. It was also provided, that in cases not founded on a distress, the plaintiff should, at or before the execution of the writ, in lieu of pledges, enter into a bond to the commonwealth, with two sufficient sureties, in twice the value of the goods and chattels to be replevied, with condition to prosecute the writ with effect, or make return thereof, if return should be awarded, and pay costs ; that, as in the case of a *capias*, the officer executing the writ, should file the bond in the office of the prothonotary, at or before the return day, and the prothonotary should enter the names of the sureties in his docket ; that the officer executing the writ should notify the defendant in writing, of the names and residences of the sureties, who might be excepted to, at any time, within twenty days after the return day and notice—on the hearing of which exception, the sufficiency of the sureties might be inquired into, or new sureties added, within ten days after notice of exception ; that the officer should be held responsible in the first instance, but that his responsibility should cease, if the defendant should not thus except to the sufficiency of the sureties, or if upon exception, they should be found sufficient, or other sureties added ; that the goods replevied, should be forthwith restored, if the sureties were found insufficient, or others sufficient were not added ; that if the goods had been taken by force, the defendant should not retain them, except by leave of the court ; if not so taken, that he might retain them on giving security ; and that the responsibility of the officer for this security, should be the same as was provided in regard to the replevin bond. In cases founded on a distress, it was provided, that the bond should continue to be taken in the manner then practised.—These provisions may be safely pronounced the most just to the community, as well as to the officer, that have yet been proposed. I say to the community—because it is evident that whatever tends to diminish his risk, also tends to increase the security of that large class of persons, who must look to him as their only security. I confess I am unable to discover any substantial reason, why the distinction should prevail, which is there taken, between actions arising out of a distress, and those not so arising.

If the principle be correct in the one case, it is equally so in the other. The inferior value of the goods usually claimed in replevin founded on a distress, is in a great degree equalized, by the frequency of that species of the action; and the aggregate amount thus claimed, will, most probably, in any given time, not fall short of the amount sought to be recovered in the other form—a fact to which, as is probable, the attention of the commissioners was not specially directed. But the change proposed, was sufficient for the time at which it was proposed; and when we view the bill as a whole, it must be cause of regret to all conversant with this part of the practice, that it was not approved by the legislature, and enacted into a law.

Having thus mentioned the several excellent reports made by these commissioners, I cannot omit the opportunity, to commend them to the more general attention of our students of law. In the evidently hasty remarks which accompany the bills prepared by them—whether passed by the legislature or not—the student will find a commentary on Pennsylvania law, which, by the clearness with which it is conveyed, and the learning it exhibits, will seldom fail to afford him the highest satisfaction. It is certainly to be desired, that much of the matter they contain in regard to our present law, should be judiciously placed in more permanent form.

I resume the consideration of the sheriff's several duties. The agency he exercises in bringing the defendant into court, has been pointed out. It is proper to inquire next, into the part he performs in carrying into execution, the judgment pronounced by the court. If it is intended to proceed against the personal property of a defendant, a writ of *feri facias* is issued by the prothonotary, and lodged by the plaintiff, or his attorney, with the sheriff. On receiving the writ, the sheriff immediately indorses on it, the day and hour of its reception. From this time, it becomes a lien on the personal property belonging to the defendant, in the county; and it is incumbent on the sheriff, as speedily as practicable, to levy on all such personal property, as shall be pointed out by the plaintiff. It is also incumbent on him, to levy on the defendant's interest in partnership property, in making sale of which, he must be equally careful, to sell such interest only; leaving the purchaser to his remedy by bill in equity, to procure an account, &c. If the sheriff refuse to

levy, an action lies against him. After this time, it is safest for the plaintiff and his attorney, not to interfere in any manner, with the execution of the writ; but to allow the officer to pursue his own course; inasmuch as any language that might be construed into a direction to suspend proceedings upon it, would undoubtedly postpone it to writs subsequently received, and thus cost the loss of the money. The levy is made by going to the place where the property lies—taking actual possession of it, by virtue of the writ—notifying the defendant to that effect—and making an inventory. If not thus made, the goods cannot be said to pass into the officer's possession, and may be removed by strangers; or another levy properly made, under a subsequent execution, may supersede the first, and thus lay the ground for an action, at the suit of the plaintiff in that writ. But to constitute a good levy, it is not necessary that the sheriff should immediately make an inventory; nor that he should immediately remove the goods, nor put a person in possession of them; if they are within his control when the levy is made, and if within a reasonable time, he takes possession of them, in such a manner as to inform the community of the fact of their seizure, it is sufficient (3 R. 401). When the levy is correctly made, as the sheriff is responsible for the goods, so he acquires a qualified property in them, and may sustain trespass or trover against any one who wrongfully removes them. If they are claimed by a third person, it is not the practice in Pennsylvania, as it is in England, to empanel a jury to inquire into the ownership; nor with us, can such an inquest be held. It is questionable whether any thing is lost by the absence of the practice; for even in England, the verdict of an inquest is not conclusive evidence in an action against the sheriff, for a false return of *nulla bona*; but is admissible only, to rebut the presumption of malice. In Pennsylvania, his only course is, before proceeding farther, to demand from the plaintiff, a sufficient bond of indemnity. What kind of a claim of property on the part of a third person, will warrant the sheriff in making this demand, is, like many similar points of practice, left undetermined. Whenever, in the language of judge Duncan, there is such a claim, as "would create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity." Generally, however, even the constant man, will find that the courts

will not allow this pause to be created, in the absence of certain formalities. These are usually a written notice, accompanied by affidavit, and wherever practicable, the common *indicia* of property, such as a bill of sale, assignment, or the proceedings of a previous judicial sale.

It is a question of some interest, whether, after the plaintiff has given a bond of indemnity to sell, the officer may receive one not to sell. This course is sometimes pursued; but while, I am aware, it seems, in some decisions, to be favoured, and is not disapproved by many of our best practitioners, I cannot regard it as the safest practice. No necessity can exist for incurring whatever risk it involves. If the plaintiff cannot furnish the requisite security, the officer may refuse to proceed, and the court will sustain him. That there is some hazard attending it, is sufficiently evident to every lawyer, in the fact that our own courts have not adjudged the point. In the few cases which touch it, the question did not present itself for decision, and consequently cannot be said to have been decided; 4 Watts' Rep. 124. The English authorities are little more satisfactory; 3 Douglass Rep. 240. Of the seven decisions referred to in Watson on Sheriff, 196, in support of the casual expression there introduced, and thence transferred to better places, without, as I apprehend, sufficient examination, it is worthy of remark in regard to a writer so generally accurate, that not a case sustains the intimated practice. The analogy of other decided cases, is certainly not in its favour. It has been determined by good authority, that a bond given to indemnify a sheriff, for refusing to commit to prison a defendant arrested on a *ca. sa.*, is void. 7 Johnson's Rep. 159. So also, a bond given by a purchaser, to indemnify a sheriff for not returning an execution, has been held void, on the ground that it was given to induce him to omit performing his duty. See 8 Am. Com. Law Dig. 66. In the case under consideration—with which, I do not say these decisions are precisely parallel—the *fi. fa.* commands the officer to sell the goods and make the money; the bond indemnifies him for not doing this; and, consequently, for disobeying the command of the writ. Might not every species of process known to a court, be, upon the same principle and in the same manner, put at defiance, by those able to command the means to indemnify its officers?

If the plaintiff is unwilling to indemnify the sheriff, after a claim of property made by a third person, but urges him to sell, it is the officer's place to apply to the court for a rule on the plaintiff, to show cause why the time for returning the writ should not be enlarged. This practice is better than to allow the plaintiff to rule the sheriff to return the writ, because that is a peremptory rule, and much discussion upon it, will, usually, not be entertained. On the argument of a rule thus taken by the sheriff, the court will determine, after an inspection of the grounds of the adverse claim, whether he is entitled to call upon the plaintiff for indemnity, or whether he must proceed without it. If, as already intimated, the case be involved in any doubt, they will order the writ to stay, until sufficient indemnity be furnished.—When clear of these obstructions, the sheriff, without any other writ, advertises for sale, the property levied on—sells it on the appointed day—and, if required, executes to the purchaser, a bill of sale. If he choose to do so, he may make the levy, and return the *fi. fa.*, as levied, accompanying his return with a schedule of the property levied on; and thus compel the plaintiff to issue a *vend. exponas*, in order to procure a sale: a return which, if made generally, without any specification of value or amount, authorizes the presumption that the property is sufficient to pay the debt. But this unnecessary use of two writs, is obnoxious to the objection, that the officer continues responsible for the property, until a final disposition of it, made by the issue of the *vend. exponas*, and a sale under it.

With the money arising from a sale, if there be no contest in regard to the mode of its appropriation, the landlord's bill for rent, not exceeding one year, if any such have been presented, is first paid; and, afterwards, the several executions, in the order of time previously marked upon them. The officer is, in general, not liable for interest on the money thus received, unless it have been employed for his own private purposes. The sooner the money is paid away, it may be remarked, the better for his character, convenience and ultimate safety.—If any difficulty arise, in respect to the rights of the several execution creditors, he protects himself by paying the money thus received, into court, where it is distributed by the judges, or by an auditor; or issues are directed to try the disputed facts. If, for any

other causes than those mentioned, the sheriff refuse to execute the writ, or if, when the money has been obtained, he refuse to pay it to those entitled to receive it, the course is, to delay until the return day—previous to which no such step can be taken—and then to rule him to make his return. The return must show clearly, what has been done. If by that, it appears, the writ has been in any respect improperly executed, an action will lie against him and his sureties, and this return will be the evidence. If the return show the receipt of the money, a rule will be granted to pay it into court; and if that be not complied with, an attachment for a contempt, issued. But a rule upon the sheriff thus to pay money, cannot be granted after the lapse of two years, from the expiration of his office. Subsequent to this time, an action is the only remedy.

When the defendant is not possessed of personal estate, and it is intended to proceed against his real estate, the course of proceedings, is different. If a *levari facias* is issued, a description of the property on which the incumbrance rests, is copied into the writ, previous to its delivery to the sheriff.—If the judgment be a general lien on the lands, a *fi. fa.* is the writ employed. Accompanying this writ, is a written description of the particular property, which the plaintiff intends to sell. This paper is attached to the *fi. fa.* by the sheriff. In furnishing the description, too much care can scarcely be employed by the attorney. If the property be, in any material respect, incorrectly described, the court will, in most instances, set the sale aside, and compel the plaintiff to proceed anew; thus consuming time, occasioning expense, and, it may be, spoiling a purchaser's bargain. Any one conversant with these subjects will inform you, that in more than a majority of the cases, in which sheriff's sales are set aside, the reasons are found, in the defects of the descriptions furnished. From this paper also, the description of the property in the sheriff's deed, is afterwards made up. This must correspond, in all respects, with that of the property returned as levied on. If the deed contain a word of description, more or less, the sheriff will refuse to sign it. Even if signed and acknowledged by him, it may at some time produce confusion, by reason of the fact, that the sheriff can only sell and convey what he has levied on; and the conveyance of any thing else, must amount to a nullity. It were a happy circumstance for the convenience of



judges, for the safety of purchasers, and for the reputation of attorneys, if a greater degree of attention were bestowed on the preparation of this paper.

An inquisition is next held on property levied on by *fi. fa.* For this purpose, a jury is selected by the sheriff, in any mode he deems best. It is usually called a few days previously to each sale of real estate; notice having been served five days previously, on the defendants in the several writs. For some years, this jury were required to set a value on the premises levied on; but the practice has been discontinued, by direction of a recent act of assembly. Pamp. Laws, 1845, p. 42. Their first business, now, is to consider the annual profits of the land and the incumbrances on it; and to determine whether or not, its rents and profits will satisfy, in seven years, the judgment on which the writ has issued. If the jury suppose they will, it is so certified; and the amount of such rents and profits, assessed. The property may then be placed in the hands of the creditor, by a writ of *liberari facias*. If the jury find that the rents and profits will not satisfy the judgment in seven years, it is not so extended in the hands of the creditor; but the sheriff returns the writ, by setting forth that he has levied on the lands described, and that they remain in his hands unsold for want of buyers. The latter part of this return is, of course, matter of form; for no attempt has yet been made to sell. On the return of the *fi. fa.*, the *vend. exponas*, into which has been copied the same description, is issued, returnable to the next return day. In the case of a *levari facias*, the property is sold upon that writ alone. If not sold, the sheriff so returns it. A *liberari facias* may then be issued, and the mortgagee invested with a clear title to the property, in satisfaction of his debt.—In practice, resort is rarely had to the *liberari facias*. In the case of a *fi. fa.*, juries seldom find the rents and profits sufficient to pay the debt, within the appointed period; while in that of a *levari*, as the plaintiff may sue out an *alias* and a *plurius* writ, he does not, generally, prefer to encumber himself with the property in this mode.

After the property has been advertised, in the manner directed by the act of assembly, it is sold at public sale, to the highest and best bidder. Unless the plaintiff in the writ be the purchaser, the sheriff usually requires payment of the price, within

ten days succeeding the day of sale.\* If not paid according to the prescribed terms, the property is resold at the risk of the first purchaser, against whom an action lies by the sheriff, for the amount of the difference, between the sum bidden by him, and that at which it is subsequently sold, together with costs. If a plaintiff who is the first incumbrancer, be the purchaser, our courts have held that they will not require him to pay the purchase money to the sheriff; but will allow the plaintiff and the sheriff to exchange receipts; the plaintiff receipting on the sheriff's docket for the amount of his bid, less the costs of the writ; and the sheriff appending to the deed, a receipt for the purchase money;—although no money, actually passes in the transaction: and it has been held that a receipt thus given by the attorney of the plaintiff, will justify the sheriff in giving a deed to the attorney, if there be no collusion. To maintain the opposite doctrine, and require a plaintiff who becomes a purchaser, to procure and pay to the sheriff, the whole amount of the purchase money, in order that the officer may, on ascertaining that it belongs to the plaintiff, as the first incumbrancer, pay it back, could obviously accomplish no just end, and might impose on the latter, peculiar hardship. His whole property may consist in that debt, to prevent the loss of which, he may have been compelled, at inconvenience, to make the purchase; and to require him to raise another sum equal to the first, before he should receive that, would, in some instances, it is evident, amount to a complete sacrifice of his rights.

When the purchase money has been paid to the sheriff, it is incumbent on him to ascertain to whom it, of right, belongs. For this purpose, he procures, on his own order, from the prothonotaries and the recorder of deeds, certified lists of the liens, entered in their respective offices, against the property. The money is distributed according to these certificates, which are thenceforth preserved by the sheriff, as his own security against the omission of any liens from the lists.

In distributing the money thus raised, all the liens on the property sold, with the exception of a first mortgage, are paid according to their priority. When, therefore, the purchaser has

\* Where usages of this kind are mentioned, it is almost unworthy of remark, that particular reference is made to the county of Philadelphia.

been invested with the title, he holds the property, discharged of liens of every description, except a first mortgage; and when the sale has been made on such mortgage, discharged of that lien. Where judgment had been entered on a bond accompanying a first mortgage, it was decided by one of our courts, that that judgment should be paid out of the proceeds of the sale, and consequently that the property passed into the hands of the purchaser, divested of the lien of such judgment and mortgage: but this case has since been specially provided for, by act of assembly. *Pamp. Laws, 1845, p. 489.* No default or mistake in the distribution of the purchase money, can affect the right of the purchaser, to hold the property thus divested of incumbrances; for injuries occasioned, the parties have their remedy against the sheriff; and he, also, against the officers certifying the liens, if error have been committed by them.

When the purchase money has been paid, or the plaintiff's receipt been given, the deed previously prepared under the direction of the purchaser's conveyancer, is submitted to the sheriff. The necessity of a preparation of the deed by another hand, arises from the importance of this paper as a link in the purchaser's chain of title; and the consequent hazard of entrusting it to any one, who cannot be made personally interested in the matter, and cannot devote to it particular attention and time. If found to conform in all respects to the writ, and the facts of the sale, the deed thus prepared, is signed and acknowledged at an appointed day, in open court. But a deed is not in any case acknowledged, and never will be, where the sheriff understands his own interest, until the payment of the purchase money has been satisfactorily arranged.—The prothonotary makes a minute of this acknowledgment; appends to the deed, a certificate of it; and afterwards records the instrument. When the purchaser has thus been clothed with the title, he has acquired all the interest, and that only, which the defendant previously held in the land. He has assumed all risks with respect to the title, and if that be defective, he is without remedy.

Many of the duties incumbent on the sheriff, particularly those having reference to the execution of original process, and of final process on personal estate, are necessarily performed by deputies. The legal relation which the sheriff sustains to his deputies, deserves a moment's consideration. In England, an

under-sheriff is appointed, whose duties and liabilities are distinct from those of the sheriff. We have no such officer here; consequently the expression "high sheriff," sometimes employed, is, if not erroneous, at least unnecessary. Neither have we the bailiffs known to the English law; their places being supplied by deputies. Of these officers, the sheriff appoints whatever number he deems proper; they give security to him, for the faithful performance of their duties; are responsible to him; and perform their official acts in his name. For the acts of each of his deputies, he is civilly liable; nor is it necessary, in maintaining suit against him for this cause, to prove a regular appointment of the deputy;—the fact that the latter so acted, being held sufficient. In some cases, the courts have gone so far, as to hold the declarations of the deputy, evidence to charge the sheriff, where they have accompanied the performance of an official act.—The deputies indorse on the writs committed to their charge, returns of service, which are signed, first by them, and then by their principal. If the sheriff is sued for a false return thus made, the deputy, who has served the writ, and made the return, becomes liable over to him. In one instance, where a return signed by the deputy alone, was made to the court, and permitted to remain without application for leave to amend, it was held to have been ratified by the sheriff, and pronounced admissible evidence in an action against his sureties.

The doctrine of the sheriff's returns, embraces a large portion of the law relating to this office. The return is a statement in writing, indorsed on the writ, setting forth the acts performed by virtue of it. Each different form of writ has its appropriate return, and in this manner, is required to be returned,—in some instances, by express decision, but in most, by custom,—unless the peculiar circumstances of the case justify a more special form. Thus, to a summons, when the defendant has not been served, he returns *nihil habet*; when served, he states the facts. To a *capias*, when the defendant has been taken, and remains in custody, he returns *c. c. (cepi corpus)*; when bail has been entered, *c. c. & b. b. (cepi corpus & bail bond)*; when the defendant has not been taken, *non est inventus*. To a *scire facias*, he returns, *made known*; to an attachment, *attached and made known*, &c.; to a writ of *replevin*, when the goods have been removed, or

cannot be found, *eloigned*; to an execution, when the defendant has no goods, *nulla bona*; when a sale of goods has been made, the particular facts. These may serve as illustrations. In returning executions, if more than one have issued against the same defendant, care should be taken to return each writ, subject to the preceding; otherwise it might appear, that the goods were sufficient to satisfy all.

The necessity for extreme caution on the part of the sheriff, in making his returns, is apparent from the fact, that in actions against him, they are conclusive evidence. It is true, that where error has been committed, the courts will, on motion, generally, allow the return to be amended; but in this, the rights of others may be affected, and suits occasioned; and it is altogether better, that the act should be rightly performed in the first instance, and no necessity of amendment induced. Where it becomes necessary to depart from the usual form of return, the only general rule that can be prescribed, is, to adhere with the utmost minuteness and care to the facts, and to state them with clearness and precision. Unless this direction be observed, there can be no safety to the officer: for it is impossible to tell in what form, mistake or wilful misstatement may affect him. In this, occurs but another illustration of the principle, in so many ways recalled to the mind of a lawyer, in the pursuit of his profession, that where legal responsibility is concerned, immaculate truth is the only protection.

I have thus adverted to most of the topics, which I deem it proper to submit for your consideration. There are others, not wholly without interest, which it is impossible to notice on the present occasion, with any proper regard for your patience; these must await some future opportunity of notice, agreeable to yourselves.—How necessary or convenient, familiarity with this part of the practice may prove, you will judge. Many things mentioned, ought to be known by the lawyer, for a reason that does not impress, at first sight. The persons selected for this office, in the present state of our law, are rarely members of the profession, and consequently require the lawyer's counsel. Those of your number who may be placed in this position, will find how indispensable is a knowledge of these forms. In many instances, the safety of the officer is dependent upon them. The interests involved in not a few of the

questions presented to the sheriff's counsel, are immensely great; the necessity for action is urgent; and the time for reflection, short. To encounter this responsibility, without reasonable preparation, would be alike cruelty to the client, and blindness to the counsel's own interest.

It may be urged, that in the performance of many of the duties I have mentioned, the practitioner of the law will find little to interest or instruct; and to a certain extent, the charge is not unfounded. Especially may those whose tastes and opportunities have previously inclined them to the study of literature in its politer forms, be expected to feel little gratification, in turning from these cherished pursuits, to others in all respects so different in their character. If, as we are informed on good authority, the most illustrious commentator on English law could not, after having effected the same change, look back on the past, without a transient emotion of regret, his humblest follower shall not be reprehended for the exhibition of similar weakness. Yet is the sacrifice which the practitioner is thus compelled to make, much exaggerated. In the case of few professional men, who know how to value time, are opportunities for the cultivation of letters, entirely cut off, unless the taste itself have been previously permitted to die out. Unhappy for the true fame of the profession, if it were so! Consider, also, how unfailing a source of enjoyment remains, in the ability to perform with promptness and accuracy, whatever our situations require. The best proof of superior endowment, is the power to do what its possessor pleases to do. It is a mistake to suppose, that because a man is proficient in one department of knowledge or of action, he ought to be the less so in another. For myself, I think, if I had the notice of a rule for taking depositions to serve, I would equally as soon entrust its service to a man of cultivated literary taste, as to the veriest blockhead that ever copied a declaration, or drew a bill of costs. Above all other considerations, there is a kind of satisfaction, arising from the consciousness of a faithful performance of duty, which acknowledges no superior degree, and which will submit itself to no fortuitous circumstance. Of this, at least, the laborious and careful practitioner of the law, need not apprehend the want.

To members of the profession who aim at accumulating

money, which, although not absolutely essential to professional reputation, nor to happiness, has never, I believe, been discovered to occasion any great degree of inconvenience;—an acquaintance with the practice of the law, and especially with that pertaining to the sheriff's office, is above all things necessary. It is here the cash touches the itching palm; and it is of course important, that it touch it in the proper proportions. Indeed, whether it ever touch it at all, depends greatly on the degree of skill, with which that aforesaid member is extended. Hence the well known fact, that gentlemen who have given this subject their particular attention, have seldom failed in the end, to amass pecuniary means; considering, probably, that in these troublous times, and in these perilous voyages, some attention was due to the amount of ballast taken on board.

It ought also to be remarked, that this part of the profession has suffered most from chicane and trick. Minds entirely equal to the direction of the spade and shovel, but as unfitted for the pursuits of a profession, have not unfrequently found a resort to these arts, convenient, in keeping the community advised of their own existence. Nor can it be asserted that all others of higher intellectual rank, have been free from liability to this censure. It is not necessary to call up such practices for condemnation, here; but it is proper to remark, how amply the maxim that honesty is the best policy, is in this instance vindicated. You shall see the man who has once descended to such arts, struggle subsequently through years of honest toil, if that be possible, before escaping the impression thus produced on the minds of others. Practice, he may obtain; money, he may obtain; respect or esteem, seldom; entire confidence, never. The old mode of stooping down to lick business together in the outset, and, afterwards, gradually straightening up and counterfeiting integrity and gentility, is so old, as to be incapable of imposing much longer, on credulity and patience. Public officers seldom fail, whether rightly or wrongly, to visit on such a man, in tenfold proportion, the consequences of every breach of faith. Counsel who suffer once, set their seals upon him, and take great care not to suffer again.—While the positive inconveniences attending these arts, are beyond enumeration, the experience of the oldest practitioner, may be vouched in support of the position, that an instance has never occurred in the practice

of the law, in which the utmost straightforwardness and candour, have been productive of harm to counsel, client, or public officer.

I have intimated that those not scrupulous in adapting means to the accomplishment of ends, have sometimes attained a kind of success, in the practice of the profession. It is but just that this should be coupled with a remark equally obvious, that those to whom, by common consent, the highest professional rank is assigned, are of all men least obnoxious to such a charge. A glance at the history of the eminent men, who, having finished the greater part of their labours, and attained the summit of professional distinction, yet remain, to cheer by their presence, to inform by their personal instructions, and to hallow the scenes of professional encounter, must induce conviction of the truth, that the strictest integrity and candour in the smallest matters, are consistent with the highest measure of success. It might well be questioned, whether, in any body of men, in any avocation in life, taken individually and collectively, these qualities have ever shone with more resplendent lustre.

Having incidentally mentioned a feature in the character of these distinguished men, it will not, I trust, be deemed inappropriate by those who hold so large an interest in their fame, if I pause a moment longer over their virtues, before bringing this discourse to a close. In the course of nature it must happen, that these lights of the profession, shall soon go out in darkness. To the numerous witnesses of their toil—to the youth they have instructed—to the friends they have counselled—the bench they have enlightened by their learning—the principles they have illustrated by their genius—the scenes of their most brilliant intellectual achievements—they must soon be lost forever, in whatever sense death is loss. When distance of time, like distance of space, shall have lent its enchantment to the view, and the inequalities which ever appear on the surface of human character, shall have faded out of sight, they will then for the first, stand revealed in the full grandeur of their proportions.—By the best calculation, it is equally certain, that while they, in the dispensations of Providence, may be long spared to their profession, and many of the younger in years be previously cut off, a large proportion of the latter must remain, to bear to posterity the true story of their fame. Those who



fill up the broken ranks, if they would imitate whatever of excellence has preceded them, must acquaint themselves with its peculiar character. A curiosity by no means idle, as we may suppose, will be discovered, to learn the nature of this excellence; for let it be borne in mind, and let the intellect be humbled in the recollection, that true eloquence writes its only record in the hearts of men. In reference especially to forensic eloquence, its finest specimens, by necessity, escape the printed page; nor do I know that in the instances to which I allude, any exception is presented to the general rule. The personal manner of our friends, their habits of study, their different styles of public speaking, the secret sources of their power, the mode in which, through so long a series of years, they preserved from taint, the sacred character of the profession committed to their charge, when it had otherwise been hopelessly degraded—all this, it is natural to infer, must be sought after, with an eagerness proportioned to the appreciation of what is excellent. While such considerations should lead us to cherish with care the character of our brethren—to emulate the illustrious examples they have placed before us, of what can actually be accomplished, and to be able, if required, to vindicate their memories,—it ought not to be forgotten, that the base which supports so glorious a superstructure, is an accurate knowledge of the practical duties of the profession.

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IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA.

[November, 1845.]

COMMONWEALTH *v.* MURPHY.

1. A conviction and sentence for recovering stolen goods knowing the same to have been stolen, under the act of 11th of April, 1825, does not render the defendant an incompetent witness.

This case came before the court on a motion for a new trial, and the error assigned was, that the learned judge who tried the cause (Parsons J.), admitted an incompetent witness.

The commonwealth offered Nancy Armstrong as a witness,

but the counsel for the defendant objected to her, on the ground that she had been convicted of receiving stolen goods, knowing the same to have been stolen, and to sustain his objection, offered in evidence the record of her conviction and sentence. The court however, admitted the witness, and the defendant was convicted; but a rule to show cause why a new trial should not be granted was allowed, and the admission of witness was the reason filed. After argument, the following opinion was delivered.

PARSONS J. By the act of the 11th of April, 1825, it is provided, that if any person shall buy, or receive any goods or chattels, or other personal property, knowing the same to have been stolen, shall be deemed guilty of and may be prosecuted for a misdemeanor, and when convicted of a *misdemeanor* for receiving or buying the goods, shall be sentenced to undergo a servitude for a period not exceeding three years. Hence it is clear that this offence in Pennsylvania is only a misdemeanor; the question is, is it of such a character as renders the person convicted infamous, and therefore an incompetent witness?

In defining the offences which render a witness incompetent, it is observed by Mr. Starkie in his Treatise on Evidence, vol. 2d, page 715: "The crimes which render a person incompetent, are treason; felony, except petit larceny; (by virtue of the provisions of the stat. 31 Geo. 2, s. 35); all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law, as perjury and forgery, piracy, swindling, cheating. So also barratry, conspiracy, at the suit of the king premunire; the bribing of a witness to absent himself from a trial in order to get rid of his evidence; so also the judgment on attain for a false verdict, will render the party so convicted incompetent." Mr. Greenleaf in his Treatise on Evidence, page 418, remarks: "It is a point of no small difficulty, to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require, that the '*publicum iudicium*' must be upon an offence, implying such a dereliction of moral principles, as carries with it a conclusion of a total disregard to the obligation of an oath." This writer in farther commenting on this point remarks: "But the extent and meaning of the term *crimen falsi* in our law, is nowhere laid down with precision. In the Roman law, from which we have borrowed the term, it includes not only

forgery, but every species of fraud and deceit. If the offence did not fall under any other head, it was called *stellionatus*, which included all kinds of cozenage and knavish practices in bargaining. But it is clear, the common law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news, and several others. On the other hand it has been adjudged that persons are rendered infamous and therefore incompetent to testify, by having been convicted of forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime, or barratry." Hence it would seem from this rule, which is sustained by decisions, that the *crimen falsi* of the common law, not only involves the charge of direct falsehood, but also is one, which may injuriously affect the administration of justice, by the introduction of falsehood and fraud.

Does the bare receiving of goods that have been stolen, knowing them to be such, fall within either of the enumerated rules? I think it does not. Clearly the offence is not a felony, for the statute above quoted, has made it but a misdemeanor. It surely does not come within any of the offences mentioned by the writer to which I have referred. It surely does not fall within that class of cases under the *crimen falsi*, which involves the charge of *falsehood*; nor does it injuriously affect the administration of justice by the introduction of either falsehood or fraud, within its even channels. Under what class does it come? Surely, within that class of misdemeanors which may subject one to severe punishment, but deprives the convict of no civil right after the sentence has been executed. To apply the severe rule; is it an offence, implying such a dereliction of moral principle, as carries with it the conclusion of the total disregard to the obligation of an oath?

Suppose a man has borne an irreproachable character through life, becomes reduced to extreme poverty and want, and a son brings to his decrepid parents food of which they partake, to save themselves from starvation, when the dutiful

child is compelled to admit while they are devouring it, that it was taken feloniously: this is a misdemeanor under our act of assembly, of which the unhappy parents might be convicted; yet who would say that this implied such a dereliction of moral principle, as to force the conclusion upon the mind, that the parent would disregard the obligation of an oath? So likewise, a parent often harbours a child, or the child a parent, with ill-gotten gain and saves him from the strong arm of justice, or the grasp of the officer of the law, conscious that an offence has been perpetrated, and silently conveys the offender beyond the reach of legal process. Such an act is criminal. But is it not the promptings of natural affection that urge on the actor, rather than a heart covered with moral turpitude, or a mind filled with a felonious design? For such an act, thus induced, should we say, that the offender would disregard the obligations of an oath, when such might be the palliating facts attending the commission of the offence, that a court rigidly administering the law, would not imprison the convict for more than a week? I think, by no strained construction of the common law, in saying what does, or does not come within the *crimen falsi*—this offence is not embraced.

In judging of this case, we are compelled to lay out of view entirely, the rules of the common law in relation to accessories after the fact and principles; because our act of assembly makes it a definite crime, and has denominated it a misdemeanor; and unless it can be ranked within the class of misdemeanors which by the common law makes the convict infamous, then the witness is competent. But whatever may be the arguments drawn from leading principles upon this subject, I consider the point settled by adjudication in this state.

In the case of the Commonwealth *v.* Sheever, 3 Watts & Serg. 338, it was ruled, that the conviction of a sheriff of the offence of bribing a voter previously to his election to the office, is not such a conviction of an "*infamous crime*," as would disqualify him from the office, under the 9th section of the 6th article of the constitution.

Judge Kennedy, in delivering the opinion of the court, seems to have laid down this rule, in deciding what crimes rendered a man infamous, and what did not, and what offences came within the *crimen falsi* of the common law, and rendered one

incompetent as a witness: he remarks: "The offences which disqualify a person to give evidence when convicted of the same, are treason, felony, and every species of the *crimen falsi*—such as forgery, perjury, subornation of perjury, attain of false verdict, and other offences of the like description, which involve the charge of *falsehood*, and affect the public administration of justice." He then addresses a laboured argument to show that the bribery of a voter at an election, does not fall within this class of offences, and therefore, one convicted of that crime is not rendered *infamous*, within the meaning of the constitution.

Now if the bribery of one to give his vote, does not involve the charge of *falsehood*, with what propriety can it be said that the mere receiving of stolen goods, fixes this kind of moral turpitude upon the offender?

We have clearly shown, that in Pennsylvania, the offence is only a misdemeanor; and certainly it does *not affect the public administration of justice*.

What then is the offence? We reply that it is that class of misdemeanors which in this state are punished by fine and imprisonment, but do not render the offender *infamous*; nor is it of that class of offences which come within the *crimen falsi* of the common law, because it has none of the ingredients which bring it within this rule.

In the case of the United States v. Brockius, 3 W. C. C. R. 99, it was held, that a conviction on an indictment for an assault and battery with intent to kill, in consequence of which the person convicted was sentenced to fine and imprisonment, it did not render him an incompetent witness. Now the punishment for an offence of this kind, may be far more severe than for the offence of receiving stolen goods. And it is quite as nearly allied to a felony, and was once held to be a felony at common law. Yet we find an eminent judge, deciding that one convicted of such a crime, is a competent witness. And it seems to me, difficult to distinguish between the cases on principle.

For in this state both are misdemeanors; but they do not involve the charge of falsehood, nor do they affect the public administration of justice, and consequently do not come within that species of offences which by the common law are of the *crimen falsi*. Hence it seems to me, the witness is competent.

In the case of *Bushnel v. Barrett*, 21 Eng. Common Law 483, when the objection to the witness was, that he had been convicted of a conspiracy to bribe a person summoned as a witness, the court decided that the person offered was incompetent, upon the ground that the offence of which he had been convicted, *was an attempt to pervert the course of justice by corrupting a witness*. And in this consisted the infamy. And it was ruled by the court in the case of the *Commonwealth v. Sheerer* 342, that the conviction of one of a crime, considered not infamous at common law, has never been held (unless by statute), sufficient to disable him from being a witness. Hence we find it laid down in *Com. Digest*, vol. 6, 341, that a man convicted of forgery, under the statute of Henry 5, sect. 3, shall be a witness; and so it is held in the same book and page, that if one has stood in the pillory where the judgment was not infamous, it does not take away his testimony. From a careful examination of the authorities, I am fully convinced that the conviction of Nancy Armstrong of this misdemeanor, did not render her an incompetent witness; and is not such an offence, which under our law, makes her *infamous*. *The motion for a new trial is therefore overruled.*

*W. D. Kelley esq.*, prosecuting attorney, for the commonwealth; *J. Murray Rush*, for defendant.

## IN THE COMMON PLEAS OF LANCASTER COUNTY.

### BROWN v. FRUIT.

1. In an action of trespass before a justice of the peace for cutting timber on the land of the plaintiff, it is not error that the record does not show in what county the land is situate.

**LEWIS J.:** This is a certiorari to remove the proceedings of a justice of the peace into this court for examination. The exception to the proceedings of the justice is, that the action is trespass for cutting timber on the land of the plaintiff, and that it does not appear that the land is situate within the county. The action of trespass for injury done to real estate is local, and, regularly, should be tried in the county where the land is situate. "But there is a *substantial* and a *formal distinction* as to the *locality of trials*; 1 Chitty 198; Cowp. 176; Co. Lit. 125, n. 1; 7 T. R. 588. Where the proceeding is *in rem* and the

*effect of the judgment* could not be had, if tried in a wrong county, as in the case of ejectment, waste, &c. (for the sheriff of one county cannot deliver the possession of land in another), the objection is *substantial*. Where the action is merely for *damages* occasioned by injuries to real property, as trespass, or case for waste, or nuisances, &c., to houses, lands, water courses, right of common, ways, or other real property, although these actions are properly local, the objection is merely *formal*, and in the opinion of lord Kenyon, in 7 T. R. 587, taken to elude the justice of the case; and, therefore, after verdict, is cured by the statute of jeofails, 17 Car. 2, c. 8, which declares that "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place *where the action is laid*." Whatever doubt existed originally upon the construction of this statute, there is now no difficulty in saying that it extends to cases where the cause has been tried in a wrong county, so that it be tried in the county where the action is brought; 1 Chitty 284; 1 Saunders 247, n. 3; 2 *ib.* 5, *e* in notes; 7 T. R. 583; 2 East 580. The statute of 4 Ann, c. 16, s. 2, extends this provision to a judgment by *confession*, *nil dicit*, or *non cum informatus*, and both statutes are in force in Pennsylvania; Rob. Dig. 39; *ib.* 43. Every thing shall be said to be *form*, *without* which or *independent* of which, the right of action appears to the court; 8 Hob. 333; Rob. Dig. 50, n. In this case, the "*right of action* appears to the court" with perfect clearness, notwithstanding the *trial* may have been had in the wrong county, and where both parties have consented to the trial, without objection, it ought to bind them. In a case of this kind, such an objection to the proceedings of the common pleas would not be available in the supreme court. And why shall not the same favourable construction be extended to proceedings of justices of the peace? The act of 20th March, 1810, Purd. 502, declares that proceedings of justices of the peace shall not be set aside or reversed for "want of formality." This act of assembly was passed at a time when the objection under consideration was well understood as arising from a "want of formality" only, and must therefore be construed as extending the statutes of jeofails to the proceedings of justices of the peace in all cases where the objection is one arising from "a want of formality." Although the land, on which

the trespass is alleged to have been committed, is, in fact, situate within the county of Lancaster, still, as the justice has omitted to mention its local situation on the record, we have treated the case as if the real estate were in fact situated in another county; and we have been more particular in examining this subject, than the case would justify, were it not that a practice to some extent has prevailed, of reversing proceedings of justices for the cause assigned as error here, in consequence of the decision in *Pennel v. Foster*; 1 Brown 355, cited in Wharton's Dig. 475. That decision is not regarded as a binding authority. A regard for long and well established principles and authorities and a fair construction of the act of assembly, compel the court to dissent from that case, and to declare that there is no cause for reversing the proceedings. *Proceedings affirmed.*

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[January, 1846.]

COUNTY COMMISSIONERS V. HAZLEHURST ET AL., TRUSTEES.

1. Personal property of non-residents is not taxable for county purposes.
2. Stock in the Farmers' Bank of Lancaster held by residents of Philadelphia in trust for other residents of Philadelphia, was assessed for county purposes: Held, not subject to county taxes.

The opinion of the court was delivered by LEWIS J.

The sum of \$15,000 in shares of stock in the Farmers' bank of Lancaster, was owned by Mrs. Ann Coleman, who, by her will, bequeathed it to her executors, in trust to pay the clear income to her daughter, Margaret C. Hemphill, for the term of her life, and at her death the stock was to pass to the said daughter's two grandsons, Wm. Hemphill and Clifford Hemphill. All the persons beneficially interested in the stock, and Isaac Hazlehurst, one of the executors of the will, reside in the city of Philadelphia. Robert Kelton, the other executor, resides in Martic township, Lancaster county. The Farmers' bank is located in the city of Lancaster; but none of the persons having any interest in, or control over the stock in question, reside within the limits of the city. The assessor of the city has nevertheless returned the stock as subject to a tax of twenty-four dollars, charged in the assessment to "Mrs. Coleman's (deceased) heirs."

The questions, growing out of the extensive system of tax-



ation necessary for maintaining the credit of the state, are so numerous, and many of them so difficult of solution, as to admonish courts of justice of the danger of hazarding opinions upon points not necessarily involved in the cases which arise. The settlement of this case does not require a decision whether the tax should have been charged to the trustees, or to the person entitled to the income for life, or to the persons entitled in remainder. We therefore confine ourselves to a statement of the reasons why judgment should be rendered for the defendant under the facts stated upon the record.

Real estate is so uniformly governed by the law of its place of location, that a tax upon it there, without regard to the residence of its owner, is in conformity with our usage, with the policy of our government, and with the tenures under which our titles are held. But a different rule prevails in respect to personal estate, which is in general governed by the *lex domicilii*. It is not usual to tax it, except in the place where its owner resides. This usage, it is true, has been departed from under the pressure of the state necessity, in the two instances of bank stock and state stock held by non-residents. In levying the state taxes upon these two descriptions of property, the legislature has had an eye to the peculiarity which distinguishes them from most other articles of personal estate. Although the owner of the property invested may reside out of the state, the capital itself, and the interest and dividends payable thereon, are immoveably located within our territorial limits; the one by the legislation which gives the debtor bank a corporate existence, and the other by the nature of our government itself. The remedy of retainer was therefore given for the collection of the state taxes, a proceeding which operated upon the fund itself, without regard to the residence of the owner. And the foreign and domestic owners are equally enforced to contribute to the payment of the taxes imposed for state purposes. Of the justice of compelling persons who reside in foreign countries to contribute to the support of a government to which they owe no allegiance, it is not our purpose to speak. That question has been determined by the proper department of the government. And it has been considered that the profits which the owners derive from the investment of capital within our territory, and the protection which is extended to their rights thus invested, justify

a demand upon them for contribution to the public burthens, according to the value of the property protected by our laws. But the same public necessity does not exist in support of a demand for county taxes. The different counties are not generally embarrassed with large debts. And the remedies provided for the collection of county taxes, upon personal estate, are confined to the residents of the particular township or ward where the tax is assessed. The general expressions used in the act of the 29th of April, 1814, must be construed with reference to the existing remedies, and to the established principle that the taxation of personal estate follows the owner's domicil. This rule has been observed in all the provisions heretofore made for the collection of county taxes upon personal estate. The tax is directed to be assessed upon "the persons residing within the township, ward or district" of the assessor. They must have "written or printed notice of the same," and "of the time and place of appeal." Their "names" must be stated in the duplicate and in the collector's warrant. "Demand" must be made upon "the persons thus charged," before any proceedings can be taken to enforce payment. After default for "thirty days," "the goods and chattels of such delinquent" may be levied and sold. If sufficient of these cannot be found, "the bodies of such delinquents" may be "conveyed to jail."

These provisions can only be made to operate upon the residents of the township or ward where the tax is assessed, and are decisive evidence of legislative intention to extend them to no other persons. Thus every man is taxed "in his own city," where he has a voice in the selection of those who impose and collect the charge upon him, and where he has notice of the amount, and of the time and place of appeal, and where he enjoys the opportunity to seek redress against unjust or unequal burthens. The infraction of this wholesome regulation is never to be presumed. It cannot take place by mere implication. It can only be effected by an express declaration of the legislative will, accompanied by proper provisions for enforcing the collection. But we have no such declaration—no such provision for collection. The right and the remedy are in harmony with each other, and a favourite principle is preserved. To a regard for this principle we are chiefly indebted for our independence, and by its faithful observance, when "the decree went forth that

all the world should be taxed," Bethlehem became the birth place of the Redeemer.

It may be added that the assessment of this particular tax is incurably defective in omitting to name any one, upon whom the notice could be served and the demand made, or whose body or goods could be seized. It is not astonishing that the officer met with insurmountable difficulties in naming the persons to be charged in the present instance. The duty involved the legal construction of the will. And, as the intelligent assessor could not with propriety, insert the names of non-residents, he conformed to the practice, in similar cases, in charging the tax to the "heirs of Mrs. Coleman." In doing this, he certainly did all that was in his power to subject the property to the county charges. But this can only be accomplished by pursuing the remedies provided by law. Such a designation of the persons to be charged, is altogether too uncertain to support a warrant for the seizure of body or goods.

*Judgment for the defendant.*

*Mr. H. G. Long*, for the plaintiff. *Mr. Reynolds*, for defendants.

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IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

[February 4, 1846.]

THE COMMISSIONERS AND INHABITANTS OF THE KENSINGTON DISTRICT OF THE NORTHERN LIBERTIES *v.* KEITH.

[ERROR TO THE D. C. C. P.]

1. Commissioners of Kensington have no claim for curbing, paving, &c., on the property adjacent, when the improvement exceeds the limit allowed by the legislature.
2. Nor does the act of 1843, disable the party to plead such excess of authority in defence.
3. A limitation of authority by a proviso, is a negation thereof.

This was a *sci. fa.* on a claim for curbing and paving by the district. The affidavit of defence, after denying consent to the work, set out that more than three squares were curbed and paved at one time, and the act of 1828-9, p. 190-1, giving the

authority to the district, provided the curbing, &c. "be not less in length than one nor exceeding three squares at one time;" and also that the lien had ceased before the writ issued. The lien was filed in 1834, and the writ issued in 1843. The court below gave judgment for the plaintiff.

*Randal*, for plaintiff. The rule in construing charters is a strict one, and if the district paved more than three squares, they had no authority and have no claim under the act. 2. The statute of limitations applies, and had barred the debt before the writ issued.

*E. D. Tarr*, contra. The act is merely directory, in fact the provision is void for repugnancy. But the act of 1843, p. 342, prohibits either of these defences being set up.

ROGERS J. The question prescribed in this case, is one of some interest to the inhabitants of the district, but happily of easy solution. It in truth is, whether municipal corporations, are without check or control, so far as the pecuniary interests of the inhabitants of the district adjacent are concerned. The act under which the question arises runs thus: "That the board of commissioners" (the commissioners of the Kensington district), "shall have full power and authority, upon the application of a majority of the owners of lots "fronting on any street, road, lane, or alley, to pitch and pave such street, road, lane, or alley, within the said district; provided, the same be not less in length, than one, nor exceeding three squares, at one time; and the property in front of which, such street, road, lane, or alley, is pitched and paved, shall be taxed, for the expense of such pitching and paving, in proportion to the extent of the same in front." By virtue, and by the authority of the act, the commissioners have undertaken to pitch, and have more than three squares, at one time, and now seek, through the medium of this suit, to throw the expense of making the same, on the owners of the property, in front of which the improvements are made. The extent of the excess is not stated, nor is it material, for the principle is the same, whether the surplus exceeds the limits prescribed, by three inches or three miles. The power to do the one, necessarily involves the right to do the other. That the commissioners may, by virtue of their general powers, if they deem it conducive to the general welfare, pitch and pave the

whole district at one and the same time, is not denied. The grant of this authority, as the legislature wisely foresaw, would not be so obnoxious to abuse, because, the burthen falling on all, the check to any injury which might arise out of it, would be in the majority, having an interest, and full power to control the action of the board. But this is a case of special legislation, and we cannot fail to perceive the difference, when the expense is thrown (as in this clause), upon individuals who may be comparatively (as where they are non-residents); but little interested in the contemplated improvement. And hence it is, that in granting the extraordinary authority, the legislature has constantly limited and restricted the jurisdiction of the commissioners, by providing, that no improvement shall be lawful, which exceeds three squares, at one time. That the restriction assumes the form of a proviso, cannot alter the case, as the intention of the legislature, which furnishes the only safe rule, is too plain to admit of question or dispute. The proviso is a limitation of power, and amounts to a negation of all authority, beyond its prescribed and clearly defined limits. It cannot be that the proviso is directory merely, as that would be to set at nought, all the guards provided by the legislature, against the abuse of authority, conferred by the act. It in truth is a question of power; and how a corporation municipal or pecuniary, can acquire a right of action against a citizen, however humble, by a palpable usurpation, passes my comprehension. It is an attempt to exercise an authority, destructive of private rights, not granted, and which the legislature refused to grant, a pretence which cannot be too firmly or promptly resisted. It matters not, what may be the motives, which prompted the legislature to qualify and restrain the general power of the commissioners, it is sufficient, that the restriction appears in the act. But a man must be, but little conversant with the history of the times, and the motives of human action, who cannot discern the reasons of the restriction. The limitation was requisite, to guard individuals against the abuse of power, which might, unless controlled, in some instances amount to a confiscation of property. Such instances have occurred, and may occur again. To a certain extent, minorities are constantly exposed to the rapacity of majorities, without the means of redress. Hence the necessity, when they, or which is the same thing, those who

represent them, exceed the authority granted, the burthen must be borne by all: the only fair rule is, that expenses should be taken from the public purse; for it would be palpable injustice that the cost of pitching and paving the streets, should be subtracted without colour of right, from the pockets of those who happen to own property, fronting the improvements. If the commissioners, who transcend their power, can notwithstanding, recover from each individual owner of the adjacent lots, the expense attending the work, they may act as they think right without check or control: there is a wrong without a remedy, contrary to the common law, and the constitution of the state. Although it may be some check (a most inefficient one indeed), to subject the commissioners to an indictment, it would be no redress to the person aggrieved. His money, notwithstanding, would be taken for purposes, and in a manner not warranted by the law. He would still be without remedy. But the bill of rights, provides, that no person shall be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. So every man, for any injury done him, in his lands, goods, person, or reputation, shall have remedy, by due course of law, and right and justice administered without sale, denial, or delay. To prevent the temptation to injustice and oppression, it is indispensable that no man's property shall be burthened with a debt, without his express consent, except in the manner pointed out by law. From the act alone is the jurisdiction derived. On that alone they must rely, as the groundwork of the action. If the proviso, had excepted any one of the streets, lanes, or alleys in the district, it would scarcely be contended, that notwithstanding the exemption, the commissioners could pitch and pave the excepted streets, and charge the cost of making the improvement to the owner of the adjacent lots. And yet it is difficult to perceive the distinction: they depend on the same principles; the arguments, which support the one, apply with equal force to the other. The acts, in like cases, are void, and for the same reason, for both are palpable usurpations of an authority, not conferred. The experience of every day, admonishes us of the absolute necessity of scrutinizing with care, the acts of corporations, whether municipal or pecuniary. It is well that the eyes of the people are open to the dangers arising from this source, particu-

larly, when it operates on individual rights, in a manner most ruinous and mischievous. On this subject, we hear frequent and just complaints. It may be, they have taken too deep root of late to be altogether prevented, but may they not, be in some measure diminished, by a firm rule, and impartial administration of justice? While the just rights of corporations are entitled to protection, they must at the same time, act within the line of duty, and on no account, or under no pretence, be suffered to overleap the limits, marked out in the act of incorporation:

*Judgment reversed.*

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[October, 1840.

**VANSYCKLE v. THE SCHOONER THOMAS EWING AND OWNERS.\***

1. What "perils of the sea" justify the master of a vessel in sacrificing the cargo or a part thereof, for the general safety.

The facts of this case are fully stated in the opinion of the court, which was delivered by judge HOPKINSON. It was argued by *Hood* for the libellants, and by *G. M. Wharton* for respondents.

Opinion of the court: The libellant in this case complains, that on the 4th of March, 1840, at Philadelphia, under a certain contract or bill of lading, he shipped in good order and condition, on board the schooner *Thomas Ewing*, whereof John W. Ireland was then master, 10 hogsheads of rum, 20 casks of fourth proof brandy, 50 barrels of rum, and 160 barrels of first proof brandy, whereof 88 barrels of the first proof brandy were laden on the deck of the said schooner, to be delivered in like good order and condition at the port of Mobile, *the dangers of the sea only excepted*, unto Ogden & Brother or their assigns, they paying freight, &c. That on the 6th of April, the vessel arrived at Mobile, that the consignees offered to pay the freight according to the stipulations of the bill of lading, that all the

\* We are indebted to Hon. A. Randall for the opinion in this case.—*Eds.*

goods were delivered except the 88 barrels of brandy laden on the deck of the schooner, which were never delivered, but that the said 88 barrels of brandy were *wantonly, illegally and contrary to the contract aforesaid*, stove in on the said deck, and totally destroyed, *without any sufficient and legal cause*, on the 4th and 5th days of April, 1840, during the continuance of the said voyage.

It is farther stated that by the misconduct and want of skill and attention of the said John W. Ireland, in attempting to proceed up Mobile bay without a pilot on board, and by other misconduct and neglect of the said John W. Ireland, the said schooner grounded on the west bank of Mobile bar, on the evening of the 4th of April, 1840; by means of which misconduct and neglect, the libellant was subjected to pay as salvage and charges incident thereto, on that part of his goods not destroyed by the said John W. Ireland, and shipped in the hold of the schooner, \$593 64.

The claim of the libellant is for the amount or value of the 88 barrels of brandy destroyed and totally lost, and for the salvage and charges paid by him on that part of his goods which was safely delivered.

The answer of the respondent, put in on behalf of the owners of the schooner, alleges that the schooner proceeded on her voyage on the 5th of March last past, and arrived at Mobile on the 6th of April following—that during her voyage, viz. on the 4th day of the said April, the vessel grounded on the bar of Mobile bay, owing to the difficulty of the navigation and the state of the weather, and to the *impossibility of procuring a pilot for the immediate use of the said schooner*, at the same time, the master thereof following the advice and direction of the pilot who was aboard one of the vessels in advance of the said schooner; the respondent avers that the said grounding of the schooner arose from and was caused by the dangers of the sea, and not in any degree by the misconduct, want of skill or attention of the said master, or by any neglect on his part. That for the purpose of lightening the vessel, and in order to save her from bilging, she striking very hard, the deck load was thrown overboard, the heads of some of the casks being stove in—that no part of the cargo but the deck load was injured—that this was done in order to the general safety and



preservation of the vessel and cargo, and conduced to that end.

The answer then proceeds to aver that having failed in all the attempts to start the schooner from her position in the mud, certain fishing smacks were employed to unload the cargo and take it to Mobile, and that the vessel being thus lightened was got off and proceeded to Mobile; that the average and salvage paid for their service were adjudged and settled by proceedings in the admiralty court at Mobile, to which the consignees of the brandy of the libellant were parties and assented; and that they received all the goods contained in the bill of lading, except the barrels thrown overboard—that they paid the freight, and also their proportion of the average and salvage.

No objection has been taken on the part of the respondent to the jurisdiction of the court, nor to the proceeding in rem. against the body of the vessel for compensation for the injury and loss complained of. I shall, therefore, give no opinion upon those points. The questions to be decided are questions of fact, and the issue is so taken in the bill and answer. By the contract, or bill of lading, the respondent undertook and bound himself to deliver the goods therein mentioned at Mobile, in the like good order and condition in which he received them, "the dangers of the sea only excepted." Has he performed this contract? Was the loss complained of caused by dangers of the sea? or were the said 88 barrels of brandy, as the libel alleges, wantonly, illegally, and contrary to the contract aforesaid, stove, broken, and destroyed, without any sufficient or legal cause? Witnesses have been examined by both parties upon this issue of fact. On the part of the libellant, George Dudley has testified, that he was a passenger and consignee of part of the goods on board the schooner; that he was on deck when she went aground, about 8 o'clock on the evening of the 3d of April. The captain proposed lightening the cargo; there was a quantity of barrels of brandy on deck. The captain and mate concluded on throwing them overboard. I understand this witness to say that this was after the schooner had been three or four hours aground. They threw the brandy overboard by staving in the heads of the barrels. This was on the west bank of Mobile bar, and about 300 or 400 yards from the light-house. The wind was not immoderately high when the schooner went

aground; there was a considerable surf and breakers; captain was much alarmed when the vessel went aground; he had not any pilot on board. There was only one officer on board. The captain did not, as deponent recollects, consult him as to staving the brandy. There was a more convenient way proposed of getting rid of the brandy, and that was by the means they adopted of staving in the heads. I would here observe that the witness does not state by whom this way of getting rid of the brandy was proposed, and he says *they*, that is, the captain and mate, adopted it; it would rather seem that the proposition came from others. The witness left the schooner the next morning, the weather being moderate but foggy, and neither vessel nor cargo having suffered, except that part thrown overboard. He says that the place where they went aground is above the place where vessels usually take in pilots. He thinks the wind was blowing on shore when the vessel went aground and the brandy was thrown overboard. There was a pilot boat, but hardly near enough to speak at the time we went aground.

Samuel Smith was not in the vessel, and says nothing as to the accident or causes of the loss.

Charles W. Ogden, one of the consignees at Mobile, gives no information as to the accident or cause of the loss, but he says it is customary for vessels bound to Mobile, to take in pilots before they enter the bay, for safety, without exception—that crossing the bar is difficult navigation—the narrows are formed by Dauphin Island and other land. The bar extends outside.

This is all the testimony on the part of the libellant, and but one of the witnesses, George Dudley, testifies any thing upon the question we are now inquiring about, that is, the cause and manner of the loss.

On the part of the respondent several witnesses have been examined. The first was Joseph Woods, but he only speaks of proceedings at Mobile after the arrival of the vessel there.

Erastus Large was on board the schooner on the voyage in question as a seaman. He testifies, that after a passage of twenty-four days they got sight of the light-house at Mobile point—saw a pilot boat in the afternoon—made toward her—the boat steered *out*, spoke a ship, and put a pilot on board of her. The boat then steered for our schooner. We spoke her

when we got near enough—asked for a pilot; they said they had none. Then we could not get a pilot. They said, follow them and they would take us in. As the weather looked very bad, like squally and rough weather, it was thought best by the captain and mate to go by their directions, and steer after the boat. This was just before sunset. They steered after the boat by their directions as nigh as we could. Before we got in, it came on so dark that they could not see the boat only by a light they put out. About 8 o'clock they struck the bottom; hailed the pilot boat, but she did not come to them. They lay then on the bar until Sunday morning, 10 o'clock. She thumped pretty hard the first night, after that she did not thump hard for more than once in awhile. The witness then details the efforts that were made, by carrying the anchor out, &c., to heave the schooner off—doing all they could until 12 o'clock on Friday night. There was a considerable sea on her, and she thumped pretty heavy. It was thought by the captain, and he believes, the mate, to throw her deck load overboard, to keep her from beating to pieces. This lightened the vessel and she did not thump so hard. The next morning they took their clothes and some provision ashore to the light-house. They had previously hung a signal at half-mast. He speaks of the employment of the fishing boats to take part of the cargo out, and get the schooner off. The vessel was considered by the officers to be in a dangerous situation, when they threw the deck load overboard, and the witness thought so himself. They did not think she would ever get off, when they went to the light-house and tried to get help. On his cross-examination, he says, that at the time they saw the pilot boat it was on the land a light wind; the weather looked thick and squally, but there was no squall. The sea was very moderate then. When the brandy was thrown overboard, there was a light breeze towards the shore, and the tide was making out at about five miles an hour. They fired guns after they struck for an hour or two. It was a rifle or musket.

Henry Jordan was a seaman on board the schooner. He says that when they neared the light-house at Mobile the weather was very thick, looking cloudy, it had the appearance of bad weather; had a fair wind going up the bay, towards the light-house. In the afternoon of Friday saw a pilot boat, hoisted

the pilot-jack and made towards the boat, she had just put a pilot on board a ship, she hailed us; we asked if they had a pilot on board, they answered no; we asked if there were any other boats out, they said they believed not—our captain asked if we could follow them in, they asked how much water we drew. The captain told them; they said, yes, keep after the boat, and we did so as near as possible. The witness then speaks of their running aground, of their efforts to get her off, that she began to beat very heavy on the bottom; it was calm but a very heavy surf, found they could do no good by heaving on the anchor. A light breeze came off the shore, hoisted their sails to take advantage of it, the schooner was still beating on the beach farther up, was beating on the bottom worse; the captain sent for the witness and another man in the cabin and asked us what we thought about throwing off the deck load. Witness told the captain that he and the mate ought to know best about it, but that I did not think the vessel would stand long whole. We accordingly went on deck, still beating on the bottom worse; a short time after the mate ordered us to throw the deck load overboard. We accordingly cut the lashings and threw over what lumber was in the road, then we tried to heave overboard a barrel of liquor, just whole as it was; we found we could not do it, and accordingly went to work staving the heads in and cutting the hoops; at last we cleared the deck, the hawser was then easier, at daylight they hoisted signals, fired through the night from a musket, went to the shore in the boat, taking Mr. Dudley, the passenger; employed the fisherman to take out the cargo and get the schooner off. On the cross examination this witness says, it was ten or a dozen miles below the light-house they first saw the pilot boat, the light-house was not then in sight, that he knows of.

On this evidence we are to decide whether the loss complained of was caused "by perils of the sea," or was the consequence of unskillfulness, negligence, inattention or fault of the master; whether, in the language of the libel, the goods in question were destroyed contrary to the contract of the bill of lading, wantonly, illegally, and without any sufficient and legal cause. The counsel for the libellant has with great industry collected and cited numerous cases to explain what are properly perils of the sea, and what it was the duty of the captain to do before

he proceeded to the extremity of casting part of his cargo overboard. The law upon these points is well settled and must be conceded to the libellant as he claims it. Our inquiry is of the facts, that is, whether the captain did conform himself to that which the law required of him in the circumstances and situation in which he was placed. The libellant has taken two leading exceptions to his conduct and proceedings.

*First.* His attempting to come up the bay without a pilot.

*Second.* His breaking the barrels of brandy, instead of throwing them overboard and taking the chance of recovering all or some of them by their floating on shore.

Some other objections have been stated, but they are either of little importance or included in those mentioned.

The schooner *Thomas Ewing* had a valuable cargo on board, about 59,000 dollars, she had three seamen before the mast with the captain, mate and cook, to navigate her. She arrived at or near the entrance of Mobile bay on the afternoon of the 3d April; the distance from Mobile is not accurately ascertained by the witnesses, but I collect from their testimony that it is about 45 miles. She came to this point in the afternoon, the navigation of the bay was known to be difficult, and I should presume, impracticable, without extreme danger at night, unless under the command of a pilot or some guidance that might be reasonably depended upon. The master of the schooner having a pilot boat in sight, hailed her and endeavoured to get a pilot from her. But it appears she had but one on board, and he was engaged for a ship then entering the bay. The master of the schooner being thus disappointed, asked if there were any more pilots out, from which we must suppose that it was his intention to wait for one, if by waiting there was a probability of obtaining one. He was answered in the negative. The question then presents itself, what was it his duty to do in the actual situation in which he was placed; a pilot could not then be had, and there was no prospect of his getting one until the next day. Night was coming on, and although the weather was not bad, nor even then squally, yet the two seamen testify that the appearances were such as to warrant a belief of approaching bad weather. Ebenezer Large says, the weather looked very bad, like squally and rough weather. This was just before sunset. H. Jordan says the weather was very thick, looking

cloudy, it had the appearance of bad wheather, and the wind was fair for going up the bay; the pilot was going up the bay, and either on the suggestion of the master of the schooner, or of the persons on board the boat, it was determined to follow her up the bay. Was this a wise and judicious determination, such as a prudent and skillful navigator would make, or is the master chargeable with misconduct, want of skill, and inattention to the interests committed to his charge, and his duties as the master of this vessel, in so determining? he had but one other choice, which was to beat out, again to sea, for the wind was setting up the bay, and take his chance there for the weather through the night, and until he should be able to procure a pilot, which was altogether uncertain. We must not forget that no person on board the schooner made any objection then to the course adopted by the captain, nor has any witness here said it was injudicious; and the mate expressly approved of it. The persons on board the pilot boat, who may be presumed to have been acquainted with the navigation of the bay, recommended it, and told the master of the schooner to follow them and they would take him in. This was done after the master had informed them of the draught of water of the schooner. It is clearly in evidence that the schooner did follow the pilot boat, steering by the directions they received from her as nigh as they could. The night was dark, at times they could see where the boat was only by their light. If the schooner had taken the other alternative and gone to sea, and any disaster had happened to her, it would have been more difficult to defend the master against the charges of unskillfulness, inattention or imprudence. It is my opinion that in determining to follow the pilot boat up the bay, he adopted the most safe and judicious course in his power, under all the circumstances in which he was placed, and, of consequence, any accident or loss which occurred in the execution of that proceeding, cannot be imputed to the misconduct or fault of the master of the schooner.

This brings us to the second ground of complaint, for it is undeniable that the master was not only bound to the exercise of skill and attention before the accident, but that after it occurred it was incumbent upon him to use the same skill and attention to prevent any loss of the cargo, or to make it as little as possible. About eight o'clock in the evening the schooner, being under

full sail, with a fair wind, and following the pilot boat as nearly as they could, ran upon a bar of mud. The pilot boat was immediately hailed, but did not come to their relief. Every effort seems to have been made by carrying out the anchor and heaving upon it, &c., to get her off, but in vain, she lay thumping on this bar heavily, there being a considerable sea and surf running upon her. It was thought, says Large, by the captain and mate, necessary to throw her deck load overboard, to keep her from beating to pieces. It was done; it lightened her, and she did not thump so hard. Jordan also details the efforts made to get the schooner off, which seem to have been all that judgment and skill could devise; she beat, he says, very heavy on the bottom; it was calm, but there was a very heavy surf. The captain sent for the witness and another man into the cabin, and asked us what we thought about throwing off the deck load. Witness said he did not think the vessel would stand long whole, and the deck load was thrown overboard. To the necessity of this measure for the safety of the vessel and all the rest of the cargo, we have the opinion of the captain, the mate, and two out of three of the seamen; can we judge of it better than these persons who were present at the scene, and whose vocation enabled them to estimate the danger and the necessity of the remedy? The event justified the proceeding, the vessel was lightened, the thumping became less, and she was finally got off without injury to herself or the rest of the cargo. As to the means of getting rid of the deck load, can we say it was a wanton and illegal sacrifice of the property, and that the barrels should have been thrown overboard, and not broken up on the deck of the vessel? She was not strongly manned, and some of her crew were necessarily employed in various services. When the order was given to throw the deck load overboard, it does not seem that the manner of doing it was expressly directed. The men who undertook it, to whom the order was given, began by cutting away the lashings and throwing over the lumber that was in their way. They then tried to heave overboard a barrel of liquor, just whole as it was, but found they could not do it, and then they went to work staving the heads and cutting the hoops. I understand, although it is not expressly said, that the order to throw off the deck load was given to the two men that had been consulted in the cabin. We have no

direct evidence of the height of the schooner's side from the deck, but I presume it is not unreasonable to suppose it was from two to three feet. A barrel of brandy is no inconsiderable weight, and I can well believe that these men could not throw eighty-eight barrels over the side of the vessel, incommoded as they must have been by the rising and falling of the vessel as she thumped upon the beach. I do not see that the charge of negligence, want of skill, or misconduct can be maintained on this part of the case.

I am of opinion on the whole case, that there was nothing in the immediate destruction and loss of the property of the libellant, nor in the conduct and proceedings of the master of the schooner antecedent to the disaster, which can be imputed to him as a fault, misconduct, or want of skill and attention in the performance of his duty, but that the loss happened by "perils of the sea," within the meaning of the contract contained in the bill of lading. The average adjustment made at Mobile, although not binding on us, shows that the same view was taken of the case both by the court of admiralty and the consignees of the libellant, who were parties to and acquiesced in that adjustment and settlement.

*Let the libel be dismissed, with costs.*

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#### JUDGE KING'S OPINION.

WE have prepared a lengthened notice of the opinion of the Hon. Edward King in the case of the Bank of Kentucky v. The Schuylkill Bank, recently delivered, in which important principles of law are enunciated. We regret that we have been obliged to defer the article until our next Number.



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SPRAGUE *v.* WOODS. 4 Watts & S. 192.

AN important question has recently arisen under the 5th section of the act of 1715, which enacts, that "*all deeds and conveyances made or to be made, and proved or acknowledged, and recorded as aforesaid*, which shall appear so to be by endorsement made thereon, according to the true intent and meaning of this act, shall be of the same force and effect here, *for the giving possession and seisin*, and making good the title and assurance of the said lands, tenements, and hereditaments, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the king's courts of record at Westminster, are or shall be in the kingdom of Great Britain."

The question which has arisen is, whether this act in any manner affects uses and trusts, or makes that an use executed, which independently of the act would have been a trust.

In *Sprague v. Woods*, 4 Watts & S. 192, the case was thus: "By indenture of 2d February, 1818, J. W., in consideration of \$500 paid by S. S. and wife, *granted, bargained, sold, aliened, enfeoffed, released, and confirmed* to S. S. and E. his wife, in trust for their children, namely, the heirs lawfully born to the said S. S. by E. his wife, a lot or piece of ground in the county of Alleghany, to have and to hold the said described [lot] in trust for their children as aforesaid, hereditaments and premises hereby granted, mentioned, or intended so to be, with the appurtenances, unto the said S. S. and E. his wife, in trust for their children and heirs aforesaid, *to and for the only proper use, benefit, and behoof of them the said S. S. and E. his wife*,

*in trust for their children and heirs forever."* The deed was acknowledged on the day of its date, but was not recorded until the day after the verdict in the cause.

The court were of opinion, that whether the estate limited to the children of S. S. and wife, two sons, who were minors at the date of the deed, was a trust or an use executed in them, was of no moment, as the charge of the court below, which was in favour of the defendant their grantee, was right in either view; and so also it must have been thought of no moment, whether the estate that passed from the bargainor was an estate for the life of the bargainees, or a fee; for it is observable that the words of inheritance are not annexed to the estate of Sprague and wife, but to the trust for the children; but it is material to advert to the remarks of judge Sergeant, who delivered the court's opinion. They are as follows:

"The English learning on the subject of the conveyances on which a use may or may not be raised, has been, for the most part, inapplicable in Pennsylvania since the passage of the act of assembly of the 28th of May, 1715, if not for a prior period. By the 5th section of that act, all deeds and conveyances, whatever be their forms, when they are duly recorded, have the same force and effect for giving seisin and possession as deeds of feoffment with livery of seisin, or deeds enrolled in any of the courts of Westminster. By a feoffment with livery of seisin, a use may be raised in any one in whose favour it is expressly declared by the deed, without a consideration expressed; and therefore *the same thing may be done here by a bargain and sale*, or any other form of conveyance duly recorded. It is in consequence of these principles established by our law in early times, that the complex and burthensome machinery of lease and release, feoffments with livery of seisin, and of fines and recoveries, adopted in England for the raising of uses, has been laid aside here, or rather has never been in common use, and the simple forms of our deeds containing words of bargain and sale, alienation, feoffment, release, and confirmation, or something tantamount, have been employed to answer all the purposes to which the former were applied in England. See *M'Kee v. Pfout*, 3 Dall. 486; *Dunwoodie v. Reed*, 3 Serg. & Rawle 445; Serg. Land Law 230, 242.

"Had the deed in question *been duly recorded* at the trial, it

would have been equivalent to a feoffment to Samuel Sprague, to the use of his children, and their estate would have been a use executed in them. It is objected, however, that the verdict and judgment were rendered on the 2d of March, 1842, and that the deed *was not recorded* till the day after, viz. the 3d of March. It does not appear by the record that this objection was taken in the court below, and the recording since might perhaps be considered as curing the error. But if it did not cure it, and the case stood on the simple deed unrecorded, the result would be the same, except that the estate of the children would be a trust instead of a use. For equity in enforcing trusts does not regard so much the mode of conveyance as the intent of the parties, and to effectuate that, will construe the instrument so as to give it effect, and will remedy defects in the forms employed. For that purpose, a deed of bargain and sale may be construed to be a covenant to stand seised, where there is both a money consideration and a relation by blood apparent in the deed. So on a feoffment without livery of seisin, equity will supply the defect of livery." 1 Fonb. Eq. 38; 2 ib. 43, 45; 1 Madd. Chan. 42.

It is with entire respect for the learned judge that the following suggestions are made, with a view to further consideration by the court when the subject shall again come up.

1. The cases of *M'Kee v. Pfout* and *Reed v. Dunwoodie*, cited by judge Sergeant, are no authority for any construction of the act of 1715, except that the possession or seisin given by the act, is not given to the effect of working a disseisin; in other words, that the 5th section does not transmute the possession tortiously. The case first named decides only that a bargain and sale of an estate in fee by a tenant by the curtesy, does not give a tortious seisin in fee to his grantee, and is not a forfeiture of his estate by the curtesy. The other case did not involve any construction whatever of the Act; but Tilghman c. j., and Gibson j., who alone held the court on that occasion, and who differed on the main point, whether a common recovery by tenant for life did not destroy the estate for life, and consequently the contingent remainder limited upon it, referred in argument to the decision in *M'Kee v. Pfout*, and gave their sanction to the point, that the 5th section does not work a disseisin. The interpretation of the act of 1715 was therefore not

settled by the case of *M'Kee v. Pfout*, further than to the extent stated, in which it is probably free from exception, and is an authority. The court would have arrived more readily at their judgment in that case, if the provisions and the history of an Act passed in 4 Anne 1705, entitled "An act for the acknowledging and recording of deeds," had been adverted to. That enactment was in these words: "That all deeds and conveyances made or to be made, proved, acknowledged, and recorded, according to the true intent and meaning of this act, shall be of the same force and effect here, *for the assurance of the said lands, tenements, and hereditaments, and for docking and barring estates tail, as fines and recoveries at common law*, or deeds of feoffment with livery of seisin, or deeds enrolled in any of the queen's courts of record at Westminster are or shall be in the kingdom of England." Miller's Laws, app. 15. This act was repealed on the 24th October, 1709, by the queen in council. 1 Miller's Laws 44. And the substitution of other words in the 5th section of the act of 1715, in lieu of the words in *italics*, is pregnant evidence that the interpretation of the act of 1715, which was overruled by the court in *M'Kee v. Pfout*, was contrary to the intention of both the legislature and the crown.

2. The word *use* or *trust* does not occur in the 5th section of the act of 1715, nor does that section contain a word to raise a doubt that the statute of uses 27 H. VIII. c. 10, was in force then, and was to remain in force thereafter, as the judges of the Supreme Court in 1808 reported that it had been and ought to continue, with the exception of certain sections of it, which have no bearing on the point in question. The 5th section of the act of 1715 does imply that the statute "for enrolment of bargains and sales," 27 H. VIII. c. 16, did not extend to this state, as it says that the deeds and conveyances referred to in the section, shall be of the same force and effect *here* for giving possession, &c., "as deeds enrolled in any of the king's courts of Westminster are or shall be *in the kingdom of Great Britain*;" and it makes the deeds themselves or exemplifications of them as good evidence as deeds of bargain and sale so enrolled, or copies thereof can be. This reference to an enrolled deed in England, the effect of which was so well known as to be a proper example, shows that we had no enrolment in Pennsylvania;

and the statute of enrolments on its face applies exclusively to lands, &c., within the realm of England. Accordingly, the judges of the supreme court have not reported that statute as extending to Pennsylvania.

3. As the statute of enrolments did not extend, and as the statute of uses did extend to the colony, it has probably never been doubted, and certainly the act of 1715 contains nothing to raise a doubt, that a bargain and sale, though not recorded, is a good and valid conveyance of a freehold in Pennsylvania, both to raise a use, and to have the possession transferred to the use by virtue of the statute of uses, precisely as it is in England in the case of a bargain and sale to pass a freehold if the deed is enrolled, and would have been in the case of such a bargain and sale without enrolment, if the statute of enrolments had not been enacted. If this is not the law in Pennsylvania, and if a bargain and sale has no effect except by the act of 1715, that is to say, when it is proved or acknowledged and *recorded*, the law has been mistaken in a thousand instances both by courts and counsel.

4. The design, probably, and the exclusive design of the act, was to transmute the possession in all cases of deeds and conveyances of lands, recorded, where such was the lawful intention of the parties, notwithstanding they were not *manifestly* such deeds as operated at common law by transmutation of possession, as in the case of feoffments, nor deeds to uses to which the possession was transferred by operation of the statute of uses, but were of that heteroclite character that could not operate directly in either way, but which required the intendment of law to make them operate in a way which the deed did not express. A form of such a deed the legislature in 1683 wished to impose upon the people as the only form. "A. B. *grants his* [lands, &c., describing them], to C. D. and his heirs, or for life, &c., for the consideration of — pounds, in money paid to the said A. B." This with livery of seisin would operate as a feoffment, and by force of the consideration it was sufficient to raise a use, and to constitute a bargain and sale; but on its face it was neither a feoffment nor a bargain and sale, and it could not operate technically as a grant. An act passed in the same year instituted a "form of possession in transferring of titles," in the case of "deeds of sale, mortgages, settlements,

and conveyances," by the delivery of the deed in open court to the party to whom it was made, intending possibly thus to supply the place of livery. But these were awkward shifts, and the first mentioned act was soon repealed by the legislature, or disallowed by the crown; for in 1693, it is not mentioned as being in force, in the Petition of Right to governor Fletcher, or in his proclamation of 1st June, 1693, setting forth all the laws then in force in the colony. Miller's Laws, app. 7. The other law as to delivery in open court is proclaimed as then in force, but its effect it is not easy at this time of day to conjecture, but it certainly does not prohibit, annul, or impair the lawful effect of any other mode or proof of delivery. Other deeds still more informal were no doubt in use at that day, manifesting a clear purpose to transfer lands in fee or otherwise, but wanting form, and were exposed therefore to difficulty when the question of their effect arose: and hence it may be supposed that the 5th section of the act of 1715 was passed, applying to "all deeds and conveyances recorded," without regard to their technical form, and transmuting the possession and seisin, and making good the title and assurance of the lands, &c., conveyed by them, with the same force and effect as feoffment with livery, or bargain and sale enrolled.

The learned judge, in his "View of the Land Laws of Pennsylvania," page 242, suggests that this section was passed to confer a privilege on conveyances that were *recorded*, that being an object which the legislature desired to attain, but which the crown would not permit them to enforce by a compulsory recording law. And this may be true. But that of itself is a reason why the act should not be construed to impair or to alter the lawful effect of an unrecorded deed of any kind, whether feoffment or bargain and sale under the statute of uses, as such a purpose in the legislature would have equally excited the jealousy of the crown. The Act does not require any deed to be recorded, except a mortgage or defeasible deed. It does not impair the effect of a feoffment with livery, nor does it comprehend such a deed; for this is one of the examples it selects of the effect intended to be given to other deeds, and the same may be said of a bargain and sale. These conveyances therefore, and all others by which the possession was transmuted by their own operation at common law, or was transferred to the use by the statute,

were left unaffected by the 5th section of the act; and although it certainly does transmute the possession to the grantee, in the case of all deeds and conveyances of lands recorded, where such is their lawful object, it does not touch the operation of the statute of uses in the case of a bargain and sale, any more than it touches the case of a feoffment with livery. It does provide a simple and effectual mode of transmuting the possession in the case of deeds that require it, but it does not affect, nor can it be properly said to apply to a conveyance which operates by the common law as a transmutation of possession, nor to a conveyance to uses to which the statute of uses transfers the possession, nor does it interfere with the most complex application of the principles of uses and trusts to any settlement, to which they can be applied under the law of England. If it does not apply to such deeds at all, it cannot mean to change their character or effect, by the ceremony of recording. Until *Sprague v. Woods*, it has never been supposed to have such a meaning.

5. It is submitted, that the application which the learned judge makes of his doctrine in *Sprague v. Woods*, is a proof that it requires further consideration. The deed in that case, though in some respects informal, was technically a deed of bargain and sale to the bargainees, to their proper use and behoof, in trust for their two children. If the doctrine of uses was applicable to the case, the estate of the children was a *trust*. The remark of the judge is, that "had the deed in question been duly recorded, it would have been equivalent to a feoffment to Samuel Sprague to the use of his children. Their estate would have been a use executed in them." A feoffment to Samuel Sprague to the use of his children, would certainly have been a use executed in them, but that depends upon the principle that the first use attracts the statute, and the use to the children is the first use; but if the feoffment had been to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, the use to C. and his heirs would have been a trust; and so if the feoffment had been to Sprague and his heirs, to the use of Sprague and his heirs, in trust for his two children and their heirs, the estate of the children would have been a trust. *Gilb. on Uses* 350; Mr. Sugden's note (1). At this day says Mr. Sugden, notwithstanding the strict words of the statute which require one person to be seised to the use of another, a limita-

tion unto and to the use of the same person is considered so clearly to vest the legal estate in him, that an express declaration that he should stand seised to the use of another, would only have an equitable operation. Gilb. 369; Sugden's note (2). Hence Mr. Sugden recommends that when the legal estate is not intended to vest in the feoffee, the habendum in the feoffment should be unto the feoffee and his heirs to the uses, and not unto *and to the use* of the feoffee and his heirs to the uses. Gilb. 350; Sugden's note (1.)

The illustration of his honour is therefore imperfect; for the comparison should have been made with a feoffment to Sprague to the use of Sprague in trust for his children and their heirs, as the bargain and sale was, and then the estate of the children would have been a trust and not a use executed in them.

The 5th section of the act of 1715, gives possession and seisin with the same force and effect as a bargain and sale enrolled or a feoffment with livery. In the case of a bargain and sale in Pennsylvania, which is good to pass a freehold without enrolment, and also in the case of a feoffment with livery, we must infer then that the 5th section does nothing. It leaves them as they were. It simply gives the same effect which they have, to all deeds and conveyances proved or acknowledged and recorded. But that remains after the act, a use executed by the statute, which was so before, and that remains a trust which was so before. If however, it is preferred to suppose that the *Act* gives possession to the bargainee, and not the statute of uses by transferring the possession to the use, then the corresponding doctrine ought to be as to a bargain and sale what it is as to a feoffment, viz. that a bargain and sale, where the act transmutes the possession to the bargainee, is of the same effect as a feoffment or lease and release, and the bargainee having actual possession, to the use of himself, in trust for another, the second use is, as in the case of a feoffment, a trust and not an use executed. Under the statute of uses it makes no difference whether a bargain and sale is to A. and his heirs, to his own use in trust for B. and his heirs, or to A. and his heirs to the use of B. and his heirs; but if the act of 1715 transmutes the possession, leaving the use unaffected, then the true statement of its effect would seem to be, that it transmutes the possession in the same manner as a feoffment, and the bar-



ginee is seised precisely as a feoffee, with only this difference, that the Act does not give a tortious seisin. It is apprehended however, that the 5th section has no effect whatever upon a bargain and sale, any more than it has upon a feoffment with livery.

6. *Sprague v. Woods* is, it is believed, the first instance in Pennsylvania in which it has been said from the bench that a bargain and sale to A. to the use of A. in trust for B. is, *if recorded*, an executed use in B. Until this point is settled by the authority of the court in a case directly involving it in judgment, no one can advise with safety in regard to various questions of great importance, if they depend on the effect of a bargain and sale *recorded*, as whether a plaintiff in ejectment in a court of law, the circuit court of the United States for instance, has a legal title, or only an equitable one upon which he cannot maintain his suit, or whether there has been a merger of two or more estates, or whether the rule in *Shelley's* case applies to make the particular estate and the remainder a fee simple. The doctrine of uses and trusts is still in Pennsylvania what it is in England; but it has now become a doubt in cases of this description, whether a bargain and sale recorded, creates a trust or an executed use, and whether the estate of the *cestui que use* is a legal or an equitable estate. This is very inconvenient, and to what end is the distinction now taken? It results in this, either that a bargain and sale recorded cannot create a trust, or that to defeat this construction of the 5th section of the act of 1715, only another name in the conveyance, need be added to the three words which lord Hardwicke said had defeated the statute of uses; namely, to bargain and sell to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs. Unless the last is a trust, a bargain and sale, whatever be the intention of the parties, cannot create a trust, nor by the same doctrine can any recorded deed or conveyance whatever.

7. What is submitted is therefore, 1. that the 5th section of the act of 1715, does not affect uses or trusts in any way. 2. That it does not apply to bargains and sales, feoffments with livery, or any other conveyances which before the Act were attended by the same transmutation or transfer of possession or seisin. 3. That if it does, it produces no effect in such cases, because

the same effect is produced by the common law or the statute of uses, independent of the act. 4. That what is necessary to raise a use, is the same now as it was before the act. 5. That such has been the uniform and universal opinion on which the profession of the law has acted in Pennsylvania, as far as there is any trace of opinion on this head in the reports of judicial decisions. And it is submitted moreover, that the doctrine of the learned judge in *Sprague v. Moore*, is in conflict with *Moore v. Lessee of Bickham*, 4 Binn. 1, where the point of the cause decided by the whole court was, that a valuable consideration in a deed of bargain and sale is essential to give it operation, and that it cannot take effect as a bargain and sale, if the consideration is left in blank:—so also with *Okison v. Patterson*, 1 Watts & S. 395, where the court say,—“to raise a use by deed of bargain and sale, a valuable consideration must be *expressed*, but as the smallest is sufficient, the amount of it need not be stated:”—so also with *Franciscus v. Reigart*, 4 Watts 118, where it was held that a bargain and sale to A. B. in fee for the use of himself, his heirs and assigns, in trust for C. D., E. F. and G. H. their heirs and assigns, was a legal estate or executed use in A. B. and a trust in C. D., &c., which is the very point: and also with what is said by chief justice Gibson in *Morrison v. Beirer*, 2 Watts & S. 86, a case in which A. & B. by the words “give, alien, enfeoff and confirm,” and without any consideration but affection and regard, conveyed a messuage and certain parcels of land, “to a school-house and congregation, or employers and their heirs, to the only proper use of a school-house forever.” The language of the chief justice in delivering judgment is this: “*It is plain* that the deed executed by Williams and Altman, did not pass the legal title, not only because there was no party to receive it, but because there was no valuable consideration to make it a bargain and sale.” See also as to the doctrine generally, *Hurst's Lessee v. M'Neil*, 1 Wash. C. C. 74; *Powers v. M'Ferran*, 2 S. & R. 44; *Keller v. Nutz*, 5 S. & R. 246; *Krider v. Lafferty*, 1 Whart. 303.

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### JUDGE KING'S OPINION.

We have before us a copy of this important opinion: Important from the amount involved in the case (upwards of \$1,000,000), the number of parties interested in the decision, as well as the number and character of the *points* involved.

The opinion is worthy the high reputation of its author, as one of the ablest equity lawyers of the day. The hearing of the case occupied the court for twenty days: the opinion forms a pamphlet of 62 pages: its length prevents us from giving more than a synopsis, which the lucid arrangement of the opinion renders an easy task.

The original bill was filed in 1839, and in 1842 an amended or supplemental bill was filed after the passage of a special act of assembly giving the court of common pleas complete jurisdiction of the matter. The Schuylkill Bank was charged with having as the agent of the Kentucky Bank, fraudulently issued (by its cashier, H. J. Levis) certificates of stock in the Kentucky Bank to the amount of \$900,000, for which spurious stock, the Kentucky Bank had become liable or had actually made compensation, that the funds derived from this issue of stock had come to possession of the defendants, and prayed relief. A special injunction had been granted in 1839, enjoining defendants from parting with the moneys derived from the spurious issues.

The points urged in defence were:

*First*, That the Bank of Kentucky transcended its charter powers in creating the agency in question.

*Second*, That if such an agency might be created by the charter, the power was not exerted on this occasion in the manner prescribed by it; and it was particularly insisted that the charter of the Bank of Kentucky did not contemplate the giving any agent authority to issue certificates of stock to the transferees.

These points were decided in favour of complainants.

*Third*, That the policy of Pennsylvania does not permit the creation of such agency. This is answered by a brief review of the statutes and the case of the *Bank of Augusta v. Earl*.

*Fourth*, That the Schuylkill Bank being merely created for *banking* purposes, could not enter into such a contract as that

alleged, viz. one of agency for a foreign bank. Judge King—p. 30 and p. 31—says:

“The counsel of the defendants, claiming to represent the corporation, repudiate such a contract, as a thing pertaining to none of the proper faculties of a bank, and as discrepant with the spirit of its charter, which interdicts the corporation from buying or selling merchandise or stocks. It is compared to a general mercantile agency, which the bank confessedly could not lawfully execute. If such in point of fact is the true character of this agency, the reasoning of the defendants is conclusive as respects the original invalidity of the contract. But is this agency fairly characterized? The first process in this inquiry is the exact ascertainment of what the mutual contract between these banks actually was. If we except the transfer agency from the agreement, we see nothing in it but the ordinary and every day arrangements between banks for mutual facilities in the transactions of their affairs; arrangements which enable banks to render real benefit to the extensive and increasing business relations subsisting between the different sections of the union. All this is undisputed. But the transfer agency is said to be the poisonous element in this contract. What is a transfer agency? It is a very harmless thing. It amounts to nothing more than the witnessing of the conveyance by one person to another, of personal property, viz. stock of an incorporated company; and in this case, also to furnishing the purchaser a certificate of ownership of such stock, on the surrender of a previous certificate of like character held by the seller. This is very simple business, involving little or no risk or hazard; requiring nothing but ordinary care and fidelity in its performance. If the necessities of one bank require its stock to be transferable in another place, whether in the state of its creation or out of it, why cannot it ask aid of a correspondent bank that does all its other business in such place? Any why cannot such correspondent bank afford the aid required? In the charter of the Schuylkill Bank there is found nothing in terms forbidding the execution of such a friendly office, either to another bank of our own or of a sister state.

“As the customs and usages of trade, are part and parcel of every mercantile contract, so a course of uniform usage, in favour of a particular course of business, prevailing among all

banks, foreign and domestic; known to every business man; never called in question by government; never repudiated by stockholders, is stringent evidence of such a course of business, being within the necessary implications of all bank charters. On this point the testimony affords the fullest light.

*Fifth.* That if the contract was rightly entered into, still the fraud being actually committed by an agent of the agent, or sub-agent, viz. Hosea J. Levis the cashier, the Schuylkill Bank, as such bank, could not be held responsible.

"The agency of the assistant is but an instrument, and every man having authority over the actions of another, who either expressly commands him to do an act or puts him in a condition of which such act is the result, shall be responsible for the act of his servant, as if it were the act of himself. Where a principal agent in the execution of his agency is obliged to employ external aid, where he is compelled to resort to the functions of a third person in the completion of business of the agency, with whom he has no connexion, and over whom he has no control, a different standard of responsibility prevails. Such is the case where a principal agent to sell goods, is by the course of trade, necessitated to employ a regular broker or auctioneer to make the sale. Law and reason alike limit his responsibility for the acts of the third person thus necessarily introduced, to care and diligence in the selection of an apparently proper person for the purpose required. In fact, when the business of the agency has reached that point, the principal agent is not an agent so much to sell, as to select on behalf of his principal, some one competent to execute a necessary function for him, which the agent cannot perform himself; and all the cases referred to in this connexion, are but various developments of this common principle. But was it ever heard of, that an agent charged with negligence or fraud, could relieve himself from liability to his principal, by showing that his clerk or his porter were the immediate actors in the wrong, and acted without his authority? If such metaphysical niceties would be at once repudiated in a natural person, why should they be recognised in a corporation?

"After the authoritative enunciation of such a doctrine, there would be found few rational persons dealing with banks. It would sweep away at once every substantial liability of these

corporations, and leave all persons, unwise enough to deal with them, at the mercy of every subordinate in their employ."

*Sixth.* That Levis, the cashier, had no ex-officio power to enter into the contract charged.

*Seventh.* That the agency was a gratuitous one. This is pronounced false in point of fact.

*Eighth.* That at the time of filing the bill, the complainants had no claim in their own right against the Schuylkill Bank. The Kentucky Bank had a right to file their bill, *quia timet*, against the Schuylkill Bank, to prevent loss.

*Ninth.* That the Bank of Kentucky was under no legal liability to compensate the holders of the spurious stock issued at Philadelphia, and that if they had done so, it was in their own wrong. The Bank of Kentucky was legally responsible for the frauds of its agent, the Schuylkill Bank, and under this head judge King denies that the transferees of stock were bound to see that the old certificates were surrendered; this, as he says, being a provision clearly for the benefit of the bank only.

*Tenth.* That the Bank of Kentucky could not legally represent the holders of spurious stock. The point is immaterial, the Kentucky Bank having actually made compensation to a portion of the holders to the extent (at par) or upwards of \$12,000.

*Eleventh.* That in point of fact the Schuylkill Bank was not the agent of the Bank of Kentucky, but that Hosea J. Levis, individually, was such agent.

Under this head judge King comments at large on the testimony, and comes to the conclusion, that though no distinct vote appears on the books of the Schuylkill Bank, it is impossible to resist the belief that the bank, as such, accepted and conducted the agency.

*Twelfth.* That the Bank of Kentucky had been guilty of laches in not sooner closing its agency.

"Nor do we attach any importance to the circumstance, that anonymous writers, calling themselves 'stockholders,' 'frightened stockholders,' and 'Philadelphia stockholders,' towards the close of this agency, threw out hints to the Bank of Kentucky, that all was not right with its Philadelphia agent. Nor that some bolder spirits expressed their doubts and fears more openly. Nor that the Kentucky Bank did not change its agent more

promptly when its suspicions ought to have been roused by the circumstances enumerated in the proofs. If they were in any way bound to supervise the actings and doings of the executive officer of the Schuylkill Bank, from their remote position, how much more intense was this obligation on the home directory of that bank, to see that his acts did harm to none of whom they were the trustees? From them it comes with a bad grace to complain that others did not perform duties which the law imposed on them, or to question their liabilities to the complainants, because they confided too long and too trustingly to them."

The thirteenth point made by the defendants, that the funds received by Levis for the sale of the spurious certificates, were not passed to the credit of the bank, but used by himself, it became immaterial to examine.

The opinion thus closes, page 61:

"It follows, that our decree must be pronounced against the Schuylkill Bank, requiring that corporation to indemnify the Bank of Kentucky, as well in its own right as representing the unsatisfied holders of spurious stock, for all losses sustained by the unfaithful conduct of this agency. For the purpose of ascertaining the extent of such indemnity, the usual reference must be made.

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IN THE ORPHANS' COURT OF PHILADELPHIA  
COUNTY.

[December 14, 1844.]

ESTATE OF D. S. REIFF, DECEASED.

1. Where an administrator takes the goods of the decedent at their appraised value, he will not afterwards be permitted to show that the appraisement is too high.

This case arose on exceptions to an auditor's report. The facts are stated in the opinion of the court.

JONES J.: The administrator allowed the widow to have certain chattels of the decedent. In settling the account, the auditor substantially charged the administrator with the value of the chattels, as appraised in the inventory filed, and refused to hear evidence that the appraisement was too high. The principle is correct: if an administrator do not submit the chat-

tels to the proper test of their legal value, a public sale, the appraisement is conclusive against him; he cannot be allowed to discharge himself by showing that the goods are overvalued, though he may be surcharged if they were undervalued. The auditor has not entirely carried out his principle, but the allowance he makes the exceptant is not the subject of exception.

*Hirst*, for administrator. *Brightly* and *J. H. Campbell*, for creditors of the estate.

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IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY.

[March 28, 1846.]

COMMONWEALTH V. ZEPP.

1. Where an indictment charged that the defendant on the 1st day of December, 1840, obtained goods by means of false pretences, there being no law at that time rendering the offence indictable, and the defendant was acquitted in consequence, it was held, that the former acquittal was no bar to a second indictment, laying the offence to have been committed at a time when it was indictable.

At the last January term of this court, a bill of indictment was found against the defendant, charging that on the 1st day of December, 1840, he "unlawfully and wickedly, devising and intending to cheat and defraud one John A. Crisswell of his goods, moneys, chattels, and property, unlawfully did falsely pretend to the said Crisswell, that two certain watches which he then and there showed, exhibited, and offered to the said John A. Crisswell, were good gold watches, and were worth \$75 each, whereas in truth and fact they were not good gold watches, nor were they worth \$75 each; by colour and means of said false *token* and pretence and pretences, he the said Zepp did there and then unlawfully obtain from the said Crisswell, one horse of the value of \$75, one wagon of the value of \$25, and one harness of the value of \$75, being then and there the property of the said Crisswell, with intent to cheat and defraud the said Crisswell, contrary to the act of assembly," &c. The defendant was tried at the March term, and a verdict of not guilty was rendered by the jury.

The next day after the verdict another bill was sent before



the grand jury, which they returned a true bill against this defendant, being a literal copy of the former, with only this variation, that in the last bill the offence is charged to have been committed on the 1st day of December, 1845. To this second bill the defendant in due form pleaded the former record of the verdict and judgment in bar of this indictment. To that plea the attorney-general filed a general demurrer, and the point for decision was, whether the plea of *autrefois acquit* was a valid plea in this case.

PARSONS J.: The point raised in this case must be decided on the state of the pleadings and the record.

It is manifest from the record of the first indictment, that the pleader in drawing the bill intended to charge the defendant with having obtained goods under false pretences, in violation of the act of assembly of 1842; but the clerk in filling up the printed blank omitted to insert after the word ~~forty~~ that of *five*; hence the indictment charged the offence to have been committed before the passage of the law making the act of obtaining goods under false pretences penal. That indictment was tried before me, and such was the state of the case; hence I told the private counsel who appeared for the prosecution, that on the face of the record there could be no conviction under the statute; but that if he had evidence to sustain the bill as a cheat at common law, he could adduce it. But no evidence was offered, therefore the court instructed the jury that the defendant could not be convicted of a crime under the statute, for the commonwealth had averred that the crime was committed before the passage of the law; hence he was acquitted.

No principle is better settled by the common law, than that no man shall be placed in peril of legal penalties more than once for the same offence. And our declaration of rights expressly declares, that "no person shall for the same offence be twice put in jeopardy of life or limb."

The first question for solution is, when is the plea of *autrefois acquit* available? A fair deduction from the text writers seems to be this; that to entitle the defendant to the benefit of this plea it is requisite that the crime charged be precisely the same, and that the first indictment as well as the acquittal was

sufficient. Hence we find it stated by serjeant Hawkins, in his P. C. vol. ii. 528: "That wherever the indictment whereon a man is acquitted is so far erroneous (either for want of substance in setting out the crime, or of authority in the judge before whom it was taken), that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment, because in judgment of law the defendant was never in danger of his life from the first; for the law will presume *prima facie*, that the judges would not have given a judgment which would have been liable to have been reversed." And the doctrine laid down by the English judges in numerous cases found in the books, seems to be, that unless the first indictment was such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Therefore, in the case of *Rex v. Vandcomb*, tried before Mr. justice Buller in 1796 (see 2 Russell 951), it was ruled, where the prisoner had been indicted for burglariously breaking and entering the house of N., *and stealing the goods* mentioned in the bill, it was no bar to a second indictment charging the prisoner with the burglary of breaking and entering the house of N. *with intent to steal* the goods, &c. See also Starkie Crim. Pl. 355; Arch. Crim. Pl. Ev. 81, 82. So also in the case of William Vaux, who was indicted for murder. 4 Term R. 44. On this plea it was resolved, that when the offender is discharged on an insufficient indictment, then the law not having had its end nor the life of the party even in danger, he may be again indicted and tried; and under this opinion Vaux was tried a second time, convicted, and executed.

Such also seem to be the American decisions. For we find it held in the case of *The People v. Barrett & Ward*, 1 John. 66, that when the first indictment is erroneous, the plea of former acquittal is no bar to a second. And in the case of *The People v. Casborus*, 13 John. 351, it was held, the arresting of a judgment after conviction on an indictment for felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. *People v. Townsend*, 3 Hill R. 479; 1 Rice S. C. Rep. 1.

The first point for consideration under these authorities is

this: was the indictment good or such an one as on which the court would have been justified in rendering a judgment? As an indictment under the statute for obtaining goods by false pretences, it was clearly defective; at the time when it is averred upon the record the offence was committed, there was no statute in this state making the act of obtaining goods under false pretences a crime, and when frauds of this description were perpetrated, the offender could only be indicted for that which was made criminal by the common law. Hence the inquiry arises, was the offence charged in the bill indictable at common law?

It is but recently that I had occasion to examine the authorities on this subject, and delivered an opinion on this portion of the law, which is reported in the 4th volume of the *Law Journal*, *Commonwealth v. Gallagher*, page 58, and the result of that examination was this; that at common law, no mere fraud not amounting to felony was indictable, unless it affected the public; and the application of the rule seemed to have been in the use of false weights and measures, in the general course of dealing—fraud by means of tokens. Another class of cases is found in the books which seem to lay down this rule; that a cheat or fraud, effected by unfair dealing and imposition on an individual in a private transaction between the parties, was not the subject of an indictment at the common law, and I have seen no authority since, nor has any one been produced on the argument which extends or varies the rule, or controverts the principles then decided.

While adverting to the case of the *Commonwealth v. Gallagher*, I take this occasion to qualify an expression used in that opinion, when the remark is made that the disposing of one's property with a view of cheating his creditors, was not the subject of an indictment. True, it would not be at common law; but by the statute of 13 Eliz. chap. 5, sect. 3, the conveying of one's property for the purpose of defrauding creditors, &c., is an indictable offence. This statute is in force in Pennsylvania. Rob. Dig. 296.

The indictment in *Gallagher's* case was at common law, and not under that statute, or that of 27 Eliz. same book, page 298, and the observations then made, were intended only to apply

to indictments at common law. I have understood that prosecutions under that statute have been carried on in this state.

Admitting then that the commonwealth had proved all that is contained in the bill of indictment, on which the defendant was acquitted, could the court have rendered a judgment upon it, the provisions of the act of 1842 being excluded from our consideration?

It has been contended by the counsel for the accused, that this indictment could be sustained at common law, because it is averred that the cheat was perpetrated by means of a "*false token*." But it appears to me, this position cannot be sustained, for I conceive that the *false token* spoken of by our law makers, has reference to a token or means used in a public manner, to effect the cheat. If for instance, a grocer in making daily sales of various commodities to his customers, should have a pair of scales which were false, set up expressly to cheat and defraud his customers, now it would be averred in the bill that the scales were the token used as the means of cheating his customers. So our act of assembly makes it criminal to effect a cheat by means of a false token. The token spoken of in our books, I conceive to be that which is used to deceive and impose upon the public generally, and not where only one individual is defrauded. And such seems to be the decision of our supreme court in 2 Watts & Serg. 408. And such was the principle laid down in *People v. Stone*, 9 Wend. 182, where it is ruled when one is charged to have effected a fraud by means of a false token, the token must be such as indicates a general intention to defraud; a mere privy token or counterfeit letters in other men's names, seems not to come within the meaning of false token, as used at common law. So in *Lara's case*, 6 Term R. 565, referred to in 2 Russ. 283, when one for the purpose of obtaining the possession of a lottery ticket, drew a fictitious draft upon his banker for the amount, when he had no authority to draw; it was ruled that an indictment could not be sustained: and Grose j. said, "That in order to make this something more than a naked lie, it had been said that the defendant used a false token, for that he gave a check on his banker; but that was only adding another lie." Similar to this was *Wilder's case*, 2 Burr. 1128, where the defendant was a brewer and was indicted for a cheat, in sending to an alehouse

so many vessels *marked* as containing such a measure, when in fact they contained a much less measure, and writing a letter assuring the purchaser that they did contain that measure, when in fact they contained much less, the indictment was quashed; and it would seem upon the ground that these *marks* not having even the semblance of any public authority, but being merely the private marks of the dealer, they were in effect nothing more than the dealer's own affirmation that the vessels contained the quantity for which they were marked.

These authorities seem to rule the present case on this point; the offence charged is, that the accused represented that these were good gold watches, and that he showed and exhibited them as such; now it seems to me that this was a mere private transaction, and the watch the *token* used, was not one calculated to deceive and defraud the public generally, and is not so strong as the token used by one of the parties in the case reported in 2 Watts & Serg., where the woman enclosed a brickbat in a roll of butter, and palmed it off upon a storekeeper; and certainly not so much affecting the public as Wilder's case, where he sent his article to a public alehouse. And on this ground most clearly, the first bill of indictment could not be sustained. Whether it would a valid indictment under the statute, is now a question before us. See Sayr's R., *Rex v. Lewis*, 205.

But the counsel for the defence have attempted to sustain the indictment on another ground; that as the commonwealth have averred that the defendant represented them to be "good gold watches, what is known by *good gold* is defined by act of congress, and therefore the token used was of a public nature. But I apprehend this argument is not sound. The act of congress referred to has relation to current coin for circulation, and I think has no application to any other species of gold, and can have no reference to that which is used in manufactured articles. It is difficult to see why congress should by legislative enactment, define the amount of gold a gentleman should have in the frame to his spectacles, the ring on his finger, the band on his cane, or what should be the quantity of alloy in gold composing the case of his watch. In my opinion the act of congress has no reference to any such articles, and the quantity of gold required to be contained in each piece of coin for circulation, is all

that the national legislature have regulated by their statute. For the reasons above stated and others, I think the first indictment was bad at common law and under the statute, and so defective that no judgment could be rendered on it; therefore the plea of *autrefois acquit* cannot avail, and judgment is rendered in favour of the commonwealth on the demurrer, and the defendant is required to plead over.

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IN THE ORPHANS' COURT OF SUSQUEHANNA  
COUNTY.

IN THE MATTER OF THE SALE OF THE REAL ESTATE OF DAVIS  
DIMOCK JR., BY HIS ADMINISTRATOR, BY ORDER OF THE OR-  
PHANS' COURT.

1. The principle that a judicial sale will not be set aside for mere inadequacy of price, extends to a sale made by order of the orphans' court.

This case arose upon exceptions to the sale and application to open the biddings, on the ground of inadequacy of price.

The case is sufficiently stated in the following opinion, delivered by

JESSUP, president. Isaac Post, having obtained a judgment against the administrator of Davis Dimock Jr., deceased, issued his *venditioni exponas* for the sale of the real estate, which is the subject of the order of the orphans' court in this case, returnable to August term last. It was sold before the return day of the writ. Prior to the time for offering the deed for acknowledgment, to wit, on the 22d of August, Daniel Searle and others representing themselves creditors of the estate of Mr. Dimock, applied to the court of common pleas, under the provisions of the 35th sect. of the act of 26th February, 1834, to stay the proceedings upon that judgment, until the administrator could make sale of the property. The affidavit of Mr. Searle states, among other things, that the property had been sold by the sheriff at an under price. Upon that application, the court desirous of protecting the interests of the orphans, as well as the creditors, stayed proceedings on the judgment, and at the next term the administrator applied for and obtained an order of sale, upon terms suggested by the creditors as fair and proper,

and which it was supposed would induce a purchase, at the value of the property.

The sale by the sheriff was for \$904. The sale by the administrator on the 23d day of January following, was for \$996. The report of this sale was made the next day, and under the rule, confirmed *nisi*.

On the 22d of April, when this report came up for final confirmation, Mr. Searle and others, creditors, again apply to set aside the sale and have the biddings opened, on the ground of inadequacy of price. Mr. Searle and William L. Post, filed at the same time a penal bond, with condition that upon a re-sale the property shall bring at least \$1100. The administrator, desirous of doing all his duty faithfully, now asks leave of the court to sell again. The purchaser, alleging that he has made his arrangements to comply with his bid, objects to a re-sale. There is no question of irregularity in the sale. Inadequacy of price is the only reason for ordering another sale.

This question of inadequacy of price in judicial sales, has frequently received the consideration of the courts of this state from time to time, from the year 1800, and is fully discussed and decided by Mr. justice Kennedy in "*Carson's sale*," 6 Watts 147.

The case of *Livingston v. Byrne*, 11 Johnson Rep. 566, is also in point. Judge Thompson there says: "a sale made at auction, and under process of law, ought not to be invalidated for mere inadequacy of price, without additional circumstances to justify it. This principle is stated by lord Eldon on the re-hearing of the case of *White v. Damon*, 7 Vez. Jr. 34, and in the case of *Burrows v. Locke*, 10 Vez. Jr. 474. It is necessary to secure proper confidence on the part of purchasers at sales of this description, and to render titles if fairly obtained certain, and not liable to be impeached by the various opinions as to its value."

This reason applies in full force to sales by order of the orphans' court.

That the orphans' court have certain chancery powers, and that they may exercise such control over sales made under their orders, as a chancellor would over sales made by a master, is not doubted, and that the general rules relating to these sales as prevailing in chancery, except so far as they are varied by

our statute should be adopted, is equally clear. But except under the peculiar rules of the English chancery, it is believed that in equity as well as at law, inadequacy of price, *per se*, is not a ground for setting aside a sale which has been fairly made. *Reed v. Brook*, 3 Littell 127; 3 Monro 373.

The adoption of the peculiar rules of the court of chancery in England, relating to the opening of biddings for mere inadequacy of price, has been much regretted by some of her wisest chancellors, and is considered of "doubtful policy." 2 Smith Chan. Prac. 235.

It has not heretofore been adopted in this state to the extent claimed by the exceptants in this case. These are sufficient reasons why it should not be engrafted upon our system. It is too complex. It gives opportunity for inducing delays. It renders sales too uncertain, and thereby tends to prevent that competition which is most likely to produce adequate price.

While therefore the court have the power to set aside a sale upon all the circumstances of the case, seeming to require it, they cannot admit the prevalence of the English rule which upon an offer of a certain advance, payment of costs and bringing the money into court, requires the biddings to be opened of course.

That practice has not been extended to this country, even in those states where they have courts of equity, distinct from their courts of law, and in which the English general chancery practice prevails.

In New York, Tennessee and South Carolina, it is held that the biddings on sales made by masters, are not to be opened under the English practice. In Tennessee, they do not open the biddings except in cases which would justify setting aside the sale altogether. *Henderson v. Lowry*, 5 Yerger 240; *Gordon v. Sims*, 2 M'Cord's Chan. 158; *Frazer v. Hale*, id. 159, note 2.

The case now presented to the court would not come within the English rule, even if that rule prevailed here. The advance proposed to be made, would scarcely cover costs and interest. No expense or costs of the purchaser are offered, and no money brought into court. These reasons might have been sufficient without going farther, but the counsel for the exceptants supposing the practice above referred to, to be proper in this state,



and having urged it upon the court, this examination of it has been deemed necessary, to prevent erroneous views from prevailing in relation to the very important sales continually making by order of the orphans' court.

*Sale confirmed.*

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## IN THE ORPHANS' COURT OF CHESTER COUNTY.

IN THE MATTER OF THE EXCEPTIONS TO THE REPORT OF THE AUDITOR, DISTRIBUTING THE ASSETS IN THE HANDS OF BENJAMIN J. MILLER, ADMINISTRATOR DE BONIS NON OF JAMES P. M'WILLIAMS, DECEASED.

1. An auditor appointed to report a distribution of a balance in the hands of an administrator, among all the parties, legally entitled to come in on the fund, is necessarily clothed with power to inquire into and adjudicate adversary and disputed claims.
2. The act of 24th February, 1834, giving to administrators *de bonis non*, the right to recover and receive from the personal representatives of a deceased executor or administrator, converted assets, does not extend to surviving executors.
3. The acknowledgment by a surviving executor, of a debt barred by the statute of limitations, with a promise to pay it, does not bind a fund in the hands of the representative of the deceased executor. Such acknowledgment and promise is personal to him who makes it, and not obligatory on the estate; and, therefore in a proceeding, in the orphans' court, to distribute such fund among the parties entitled to it, a legatee named in the will of the testator, may set up the statute as a bar against such debt.

This case came up for hearing on an exception to the report of an auditor, appointed by the orphans' court to report a distribution of the assets in the hands of Benjamin J. Miller, administrator *de bonis non* of James P. M'Williams, deceased, who, in his lifetime, was co-executor with John S. Bowen of the will of Samuel M'Williams, deceased. Miller had settled an account of his decedent's administration of the first estate, and the balance for distribution belonged to that estate. Samuel M'Williams the testator, in his lifetime, was indebted to one E. Way, on a note or due bill, which, long before the auditor sat, had been barred by the statute of limitations. Before this, however, and within six years, but after the death of James, his co-executor, Bowen, the surviving executor, acknowledged Way's claim to be a subsisting debt, due from the estate of

Samuel M'Williams, promised to pay it, and did pay a part of it. Way appeared before the auditor, and claimed the amount of his debt to be paid out of the fund in the hands of Miller. This was resisted by one of the residuary legatees, named in the will of Samuel M'Williams, on the ground that the debt was barred by the statute of limitations; but the auditor conceding the claim to be taken without the statute, by the acknowledgment of Bowen, allowed it, and so reported. To this part of the report, the residuary legatees filed an exception.

The case was argued by *Townsend* for the exceptor, and *Bowen* for Way.

The following opinion was delivered by

BELL, president. In this case, if I understand it, the auditor was appointed to report a distribution of the balance, remaining in the hands of the administrator, as shown by his administration account, among all the parties, legally entitled to come in on the fund; and not, as in Gossner's estate (6 Wh. 401), to make distribution among the widow and next of kin of the intestate. He was, therefore, necessarily clothed with power to inquire of and adjudicate adversary claims, without which he could not have performed his duty. This is the case in every instance, where an auditor is appointed to distribute the assets of an insolvent estate, and is a highly convenient mode, under the direction of the court, of settling disputed claims and effecting a final settlement of intestates' estates. See *Torr's* estate, 2 R. 250.

But has the auditor decided correctly upon what would seem from his report, to have been the only litigated question before him? The fund, for distribution, arises from property received and moneys collected and converted or administered, by the accountant's intestate, in his lifetime, as one of the executors of Samuel M'Williams, deceased.

The other executor, who survives, is John S. Bowen esq., who has settled a separate account of his administration of his testator's estate, so far as the same came to his hands. Samuel M'Williams, in his lifetime, gave a note or due bill, as it is called, dated April 2d, 1834, for the payment of \$68, to Ezekiel Way, but the obligation thus created, was barred by the statute of limitations long before the auditor sat, in this case, to make distribution. Upon its being presented for allowance, before

the auditor, it was, on this ground, resisted and only admitted to come in, as a subsisting claim, because, as was supposed, an acknowledgment of it as an existing debt, against the estate of Samuel M'Williams, and a promise to pay it by Bowen, as surviving executor, after the death of James Porter M'Williams, revived it, or created a new claim, as against the fund in the hands of the accountant Miller. The simple question, presented for our decision, is whether such an acknowledgment and promise can work such an effect?

In the case of *Bowen v. Miller*, decided on a motion for a new trial, by this court, in September, 1842, we had occasion to inquire into the rights of this surviving executor, in respect to the fund in question. It was an action brought by the executor against Miller, the present accountant, as administrator *de bonis non* of the estate of James Porter M'Williams, in which the plaintiff claimed to recover the assets belonging to the estate of Samuel M'Williams, deceased, which had been received and converted by James P. M'Williams in his lifetime, as one of the executors. It was decided that such recovery could not be had, for the reason, among others, that although, whatever of the personal property of a testator or intestate, remaining in *specie*, at the death of an administrator or executor, goes to the surviving administrator or executor, if there be one, or where there is none to the *administrator de bonis non*, yet that which is reduced to possession and has been changed or converted or administered by the deceased executor or administrator, goes to his personal representatives. This was the common law rule, which made the deceased executor guilty of a *devastavit*, if he died without paying the debts of the testator, to the amount received, but which, in such case, gave no remedy to the creditor, because the injury inflicted being in the nature of a *tort*, died with the person. This was remedied by the statutes 30 Car. 2, cap. 7, and 4 and 5 William & Mary, cap. 24. Since which, if executors or administrators died, after having changed the specific character of the chattels of or debts due to the testator or intestate; as by selling the one or collecting the other; the creditors might sue and recover their debts of the personal representatives of such deceased executors or administrators, to the extent of the funds so converted or changed; and if a surplus remained, the legatees or next of kin might

recover it. These statutes gave no action to a surviving executor, or to an administrator *de bonis non*, "for the reason that as the estate of the deceased executor or administrator, remained, immediately, liable to the parties entitled to the fund, it would be iniquitous to deprive his personal representatives of payment in favour of a co-executor or administrator *de bonis non*, who is not liable for the devastavit of his fellow or the preceding representative, unless he has in some way, made himself a party to it." *Bowen v. Miller*, C. P. of C. C., September, 1842, and the cases there cited.

The surviving executor, or the administrator *de bonis non* had, then, absolutely nothing to do with the converted property of which the deceased representative died possessed or of which he had disposed; he could neither recover it, nor was he liable in respect of it.

Then came the act of 24th of February, 1834, relating to executors and administrators, by the 31st section of which, the law in this particular is changed so far as it relates to administrators *de bonis non*, but still leaving the rule so far as it affects surviving executors, untouched. These yet, have no power over the fund in the hands of a co-executor at the time of his death. The application and distribution of it, belongs still to the personal representatives of the deceased executor. Why, then, should any thing which the survivor can say or do, be permitted to affect a fund indirectly, over which he can exercise no control directly? It is well settled that the admission or confession of one of several executors of a debt due, shall not be received to charge his co-executors or the estate they represent, whether the confessing executor be a party to the suit or not. *Hammond v. Huntley*, 4 Cowen 93; *Forsyth v. Ganson*, 5 Wendell 561; *M'Intyre v. Morris*, 14 Wendell 99. Nor will such a confession take a demand out of the statute of limitations, as against the other executors. *Fritz v. Thomas*, 1 Wh. 66; *Reynolds v. Hamilton*, 7 W. 420. If this was an action of law, by the creditor against the administrator of the deceased executor, which, as it has been shown, might be maintained, would the acknowledgment of the surviving executor, made after the death of his colleague, be received as an answer to the plea of the statute of limitations, in order to let the claimant in on this fund? To show that it would not, it is only necessary to recur

to the legal consequence flowing from the recognition of a debt barred by the statute. It is now, I think, settled that it is not to be regarded as a revival of the old obligation, but the evidence of a new promise, personal to the party making or receiving it. For this reason, it was decided in *Fritz v. Thomas*, *supra*, that such an acknowledgment or recognition made by an executor or administrator, will not preclude him from afterwards pleading the statute; for the promise is, as to him, personally void for want of consideration, and it is said he cannot charge the estate on the foundation of the old one. If this be so, in respect to the executor defending, *a fortiori* it is so, where the representative against whom the action is brought, or claim sought to be enforced, is no party to the promise or recognition. To be sure, in the first case, the executor is not bound to plead the statute against an honest debt, but I think it very certain, he could not prevent his co-executors, in a suit against all, from doing so. The rule is, that personal representatives may sever in their pleas, and that shall be accepted which is most beneficial for the estate. For a still stronger reason, if possible, the promise of one executor will not prevent the bar of the statute, in a suit against the other. Thus in *Reynolds v. Hamilton*, 7 W. 420, an action against a surviving executor, who pleaded the statute, it was shown the deceased co-executor, who was also residuary legatee of the estate, had acknowledged the debt, within six years, as being justly due, and actually paid a part of it. But it was held, this did not prevent the survivor from insisting on the statute. The court say, "as the old promise is not revived, but superseded by the new one, the consideration of a moral obligation would be wanting to make the executor personally liable; and though the residuary legatee may possibly be under a moral obligation to pay the testator's debts, though this is by no means clear, his promise to do so could bind no one but himself." If the present case be not parallel to and so decided by the last case cited, it is, if possible, more open to the application of the principle which governed there, and in *Fritz v. Thomas*; for here, as has been already intimated, the surviving executor and the administrator *de bonis non* are absolutely independent representatives of distinct funds, having no connexion with each other, except so far as one may take ad-

vantage of payments made to the creditors of the estate of the testator by the other.

It may be said that it is not, on the report of the auditor, apparent that the administrator raised this objection against Mr. Way's claim. But it sufficiently appears, it was made by parties interested in the fund and legally before the auditor. That creditors of the first estate, might have interposed the bar of the statute, does not admit a doubt, and in this equitable mode of proceeding, I see no objection to legatees doing so, especially if the personal representative makes no objection, of which there is no evidence here. 2 Williams on Ex'rs. 1283; 1 Russ. & M. 349; 4 Com. Eng. Ch. R. 458.

What might be the effect of a judgment at law recovered against the surviving executor, and whether upon its being presented as a claim against the fund in his hands, the administrator *de bonis non* would be precluded from going behind it and showing that the foundation of it, was bound by the statute, it is not necessary now to decide. I am inclined to think he would not, upon the reasoning of Robert's case and the authority of the cases there cited, decided by this court, March, 1844.

I am, therefore, of opinion, that the claim of Ezekiel Way, as allowed by the auditor, must be stricken out of the report.

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## IN THE COMMON PLEAS OF CHESTER COUNTY.

BOWEN, SURVIVING EXECUTOR, &C. OF SAMUEL M'WILLIAMS, DECEASED, v. MILLER, ADMINISTRATOR DE BONIS NON, &C. OF J. P. M'WILLIAMS, DECEASED.

1. A surviving executor, cannot maintain an action against the personal representative of a deceased co-executor to recover assets changed, converted or administered by the latter in his lifetime, although a former administrator of the deceased executor, had settled an account with the surviving executor, whereby he acknowledged his intestate to be indebted to the first estate, on account of the assets recovered.
2. A surviving executor is entitled to recover and receive from the administrator only such goods, &c., belonging to the first estate, as remained in the hands of the deceased executor, unchanged and unadministered at the time of his death.
3. His estate cannot be made liable to the survivor, for the value of goods sold and

rents collected, of the first estate, by his administrator, as the agent of the survivor; and this, though the administrator, in an account settled, acknowledged the estate of his intestate to be indebted to the survivor for such goods and rents, as being applied by the administrator in relief of the estate represented by him.

4. An executor or administrator, cannot by the statement of an account or by his promise, bind the estate of a decedent to the payment of a debt not due from it.

This was a motion for a new trial. The facts upon which it was founded sufficiently appear in the opinion of the court, delivered by

BELL, president. On the trial of this cause, the defendant's counsel submitted certain points, on which he asked the court to instruct the jury. Among these was the proposition, that "no action can be maintained by a surviving executor to recover the assets of the estate of the testator, which came to the hands of a deceased co-executor." By this was meant, it is to be presumed, assets administered, changed and converted by the deceased executor. On the suggestion of the court, it was agreed that several of these points, including that just cited, should be negatived, with leave to the defendant to move for a new trial, if the verdict should be against him. A verdict being rendered for the plaintiff, a motion for a new trial, founded on several reasons, has accordingly been made. Two of these are, that the court erred, in answer to the defendant's eleventh point, in saying that an action can be maintained, by a surviving executor, to recover the assets of the estate of the testator which came to the hands of the deceased executor, and,

That the jury rendered a verdict for an amount which included money for which the estate of J. P. M'Williams was not responsible, but for which Swayne alone was liable, as for a private debt.

If these objections be well founded, they are decisive against the plaintiff's right to recover in this action, and render unnecessary any examination of the other reasons filed by the defendant.

On the trial, it appeared that the plaintiff, John S. Bowen, and the defendant's intestate, James Porter M'Williams, were executors of the will of Samuel M'Williams, deceased. During his lifetime, James P. M'Williams, collected certain rents due the estate of the testator and received the possession of certain per-

sonal chattels, all of which he changed and converted, except a small portion of household goods, which remained in specie, at his death. Letters of administration of his estate, were granted to William Swayne, who, as agent of Bowen the surviving executor, sold the goods which remained unadministered, that is to say, unchanged, in the hands of his intestate, and collected some debts due to the first estate. A settlement of accounts was had between Bowen and Swayne, from which it appeared that the former, in his individual capacity, was indebted to the latter, as administrator of the estate of James P. M'Williams, in the sum of \$128, and Swayne acknowledged the intestate's estate to be indebted to Bowen, *as surviving executor*, in the sum of \$212. This sum is made up of the assets received *and administered* by M'Williams in his lifetime, as executor of Samuel M'Williams, and the value of the specific chattels sold and debts collected by Swayne, after the death of his intestate, as already mentioned. Shortly after this settlement, Swayne was removed from the office of administrator of M'Williams' estate, by the orphans' court of this county, and new letters were granted to the defendant, Benjamin J. Miller, against whom this suit is brought, to recover the balance acknowledged to be due by Swayne, on settlement, to the plaintiff. The verdict being for this balance, the question presented is, whether, under the circumstances detailed, the plaintiff is entitled to an action against the estate of James P. M'Williams, in the hands of Miller.

As a general principle, it is true that if there be several executors or administrators, they are regarded as one person, having a joint and entire interest in the effects of the testator or intestate, which is incapable of being divided; and in case of death, such interest shall vest in the survivor, without any new grant. Williams on Executors 591-2. But this is the case only, where one of the executors dies before the joint tenancy is severed, by a division of the effects of the testator, or a reduction to possession and a conversion of them; for, even in cases where executors are entitled to the residue after payment of debts and legacies, survivorship only obtains as to such of the testator's personal estate as was not reduced to possession and divided before the death of the co-executor. Baldwin v. Johnson, 3 Bro. C. C. 455; Griffiths v. Hamilton, 12 Ves. 298; Williams on Executors 697-8.



The rule is, that whatever remains in specie and *unconverted*, belongs to the surviving executor or administrator *de bonis non*, but that which is changed or appropriated, goes to the personal representative of the deceased executor or administrator. Upon this subject we are spared the labour of investigation by the very elaborate and well considered opinion of Mr. justice Kennedy, when delivering the judgment of the supreme court in *Potts v. Smith*, 3 Rawle 361. See also, *Commonwealth v. Strohecker*, 9 Watts 479. To be sure the precise point presented for decision in that case, was the right of an *administrator de bonis non*, to recover administered assets from the administrator of a deceased administrator; but this rendered necessary a review of the whole subject of the rights of executors and administrators, and the interest which they take in the estates of their testators and intestates, and it is there clearly shown, that at common law, if an executor sold the goods or collected the debts due to the testator and died without paying the debts due from him, it was a *devastavit*, for which the creditors had no remedy, because the injury inflicted, being in the nature of a tort, died with the person; but that this was remedied by the statutes of 30 Car. 2, cap. 7, and 4 and 5 W. & M. cap. 24; since which, if executors or administrators die after having changed the specific character of the goods or debts of the testator or intestate, as by having converted the goods into money, or having collected the debts due and owing to their testator or intestate, or having taken new securities for them payable to themselves, and released or given up the old; the creditors may sue and recover their debts of the personal representatives of such deceased executors or administrators, to the extent of the funds so converted or changed, and, if a surplus should remain, it may be recovered, by the legatees or next of kin, in a court of equity; and in this state, where no court of chancery exists, at law. The statute gives no action to a surviving executor or administrator *de bonis non*, nor ought it, for, as the estate of the deceased executor remains immediately liable to the parties entitled to the fund, it would be iniquitous to deprive his personal representatives of the means of payment, in favour of a co-executor who is not liable for the *devastavit* of his fellow, unless he has in some way made himself a party to it. *Douglass v. Saterlee*, 11 John. Rep. 16;

M'Nair's Appeal, 4 Rawle 157. This view is supported, if indeed farther support were necessary, by the case of Patterson's Estate, 1 Watts & S. 291. It is hardly necessary to say, that the case of a surviving executor is not within the 31st section of the act of 24th February, 1834, extending the remedies of an *administrator de bonis non*.

Apart then from the settlement made between Bowen and Swayne, it is plain the plaintiff, as surviving executor, is not entitled to recover, for the rents collected and goods converted by James P. M'Williams, as executor. But the plaintiff declares on the account stated, and insists that Swayne had the power to enter upon a settlement with him of moneys due from the estate of his intestate, and having so done and acknowledged a balance to be due the surviving executor, the defendant is not at liberty to go behind it in order to examine into the items of which it is made up, and so is concluded. It is true that on an *insimul computasset*, the plaintiff is not obliged to give evidence of the several items constituting the account, but it is sufficient if he prove the account stated, for that is the cause of the action, and was, formerly, conclusive; but greater latitude is now allowed for the correction of error. *Trueman v. Hirst*, 1 Term Rep. 40. It is not necessary to decide whether Swayne is bound, personally, by the settlement, but it cannot be pretended that even an express promise made by him, while administrator, will bind the estate of his intestate to the payment of money not due from it. *Fritz v. Thomas*, 1 Wharton 70—71. Such a promise is *nudum pactum*: how, then, can a settlement which at most, only raises an implied promise, create an obligation to pay? When I speak of a debt not due, I do not mean a case of doubtful liability or disputed account, but where, as here, the plaintiff is utterly without a right of action. To permit an executor or administrator, to make a settlement binding, in such a case, on the estate he represents, would be to give him the power to state an account not of debts due from the estate, but of debts *not* due. It is only necessary to state the proposition to show its unreasonableness; and to say that you shall not inquire into the foundation of such a settlement, is but another mode of claiming for the personal representative, a power which we have seen he does not possess.

Was then, any part of the sum included in this settlement,

due from the estate of James P. M'Williams to the plaintiff? We have already disposed of this question so far as it relates to the assets received and converted by the deceased, and the other items admit of still less question. These were the avails of goods sold by Swayne, after the death of M'Williams, as the agent of the plaintiff, and rents due the estate of Samuel M'Williams also received by Swayne, subsequent to the death of his intestate. With these transactions, M'Williams could have had nothing to do, for they occurred after he had ceased to exist. In what way, then, was his estate liable to Bowen as executor? It will not do to answer that the moneys thus received by Swayne, may have been applied by him to the use and for the benefit of M'Williams' estate, for, in the first place, there is no evidence of such application, and if there was, it would only operate to give Swayne a right to credit himself on the settlement of his administration account, as for so much expended of his private funds for the relief of his intestate's estate, and not to create an indebtedness from the estate he represented to Bowen. The debt, if any due, was in truth the private debt of Swayne to Bowen, and nothing that the former could do, would avail to shift the burden from himself to the estate: it was not in his power to increase its liabilities beyond what they were at the death of the intestate. But it is not necessary to elaborate the point.

It being, then, established, that at the time of the commencement of this suit, the plaintiff had no cause of action against the defendant, the jury ought to have been instructed on the trial as was prayed by the defendant, but this not being done, whereby a verdict passed for the plaintiff, the defendant is entitled to his motion.

*Wherefore the rule for a new trial, is made absolute.*

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IN THE ORPHANS' COURT FOR THE CITY AND  
COUNTY OF PHILADELPHIA.

[June 20, 1845.]

## LUDLAM'S ESTATE.

1. Testator made a bequest as follows: "at and immediately after the decease of my said wife, I give and bequeath unto my nephew, James Ludlam, his executors &c., one thousand dollars of the United States six per cent. stock or loan of year 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 267." Previous to the testator's death, the government of the United States paid off the loan of 1812, and the testator received the \$1000 standing in his name. Held, 1. That the legacy was specific, and that by the testator's receipt of the money, it was adeemed and extinguished. 2. That it made no difference that the receipt of the money was compulsory, and that the fund was changed by act of law, and not by the act of the testator.
2. An executor in filing his account, charged himself with a certain legacy, and transmitted a copy to the legatee accompanied by a letter in which he expressed his willingness to pay over the amount when required. Held, that the executor was not estopped from denying the claim of the legatee, it appearing that he had acted in error in supposing the legacy to be still existing, when in fact it had been adeemed in the lifetime of the testator.
3. It seems that under the 47th section of the act of 1834, and the 1st section of the act of April, 1840, an executor cannot move for the appointment of an auditor to audit and settle his own account, but that the appointment must be made on motion of a legatee. But an irregular appointment may be adopted by the acts and conduct of the legatee.

This case came before the court on exceptions to the report of an auditor. The facts connected with the questions raised for decision, are sufficiently stated in the opinion of the court, which was delivered as follows by

KING, president.

On the 15th of April, 1824, George Ludlam made his last will, in which he bequeathed the rents, issues and profits, interests, dividends, and income of all his estate, real and personal, to his wife Lydia Ludlam for life. The second item in his will, under which the question involved in this controversy arises, is in the following words: "At and immediately after the decease of my said wife, I do give and bequeath unto my nephew James Ludlam, now of Oxford street, London, his executors, administrators and assigns, eleven shares of stock of the president, managers and company of the Germantown and Perkiomen Turnpike Road; *one thousand* dollars of the United

States six per cent. stock or loan of the year 1812, *standing in my name on the books of the loan office*, Pennsylvania, *as per certificate No. 267*; twenty shares of the capital stock of the company for erecting a bridge at or near Trenton; and ten shares of stock in the Philadelphia Insurance Company." The testator died in 1827. Previous to his death, the government of the United States paid off the loan of 1812, and Mr. Ludlam received the \$1000 standing in his name. The money so received by him, Mr. Ludlam handed over to Mr. Matthew L. Bevan the present executor of his estate, by whom it was paid into the firm of Bevan & Porter, who were Mr. Ludlam's bankers. This money was afterwards paid over to Bevan & Humphreys, who during the life of Lydia Ludlam the testator's widow, continued to pay the interest thereon to her.

The first question for decision is, whether the legacy of \$1000 government stock, was adeemed and extinguished, by the receipt of the amount by the testator, when the loan of 1812 was paid off. This depends on the fact of this legacy being general and pecuniary, or specific. If it is specific, it is adeemed and extinguished; if general and pecuniary, it is not. A specific legacy has been defined to be, "the bequest of a particular thing, or money, specified and distinguished from all others of the same kind, as of a horse, a piece of plate, *money* in a purse, stock in public funds, a security for money, which would immediately vest without the assent of the executor." It differs from a general or pecuniary legacy in this respect, that if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; and on the other hand, if such specific legatee be disappointed, as by failure of the specific fund, the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator. There is another class of legacies, which the course of the argument for the legatee requires us to notice. These are legacies in the *nature of specific legacies*; as of so much money with reference to a particular fund for their payment. This kind of legacy is so far *general*, and differs so much in effect from a mere *specific* legacy, that if the designated fund be called in, or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far *spe-*

cific, that it will not be liable to abate with general legacies upon a deficiency of assets. 1 Roper 149-50.

That legacies of public or other stocks *may* be specific, is unquestionable. The inquiry in all such cases must be, whether the intention to make them specific is clear; which is certainly requisite to render them so. The intention however, is generally to be ascertained from the face of the will itself. What kind of expression is sufficiently indicative of such an intention, has frequently engaged the attention of courts, and received their decision. In *Bastian v. Cooke*, 5 Vesey 461, a testator gave to his son, "John Cowling Barton, £3000 stock in the 3 per cent. consols, bank annuities being part of my stock *now standing in my name*, to be transferred to him by my executors," &c. A question arising whether this legacy was or was not specific, "a great deal," says the master of the rolls, "may be urged as to intention; to show that the testator had no idea of the consequence and nature of a specific legacy. But upon the will and the report, is there any ground to say this is not specific, being clearly so according to every determination on the words?" Again he remarks: "If the testator had sold out part of his stock, the executors would not have had to replace it: *but it would have been adeemed.*" In *Norris v. Harrison*, Madd. Ch. Rep. 280, Am. edition 487, a bequest of "the *sum of* £11,000 capital bank stock *show standing in my name in the books of the Governor and Company of the Bank of England,*" was held by sir Thomas Plumer to be clearly specific. In *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 108, the bequest of the interest of a bond of £3500 for life to B., and the principal at her decease to C.; in *Ryder v. Wager*, 2 P. Wms. 328, the bequest of the residue (after deducting £500) of money owing to the testator by sir M. H.; in *Chaunth v. Beech*, 4 Vesey 555, the bequest of £8000, the amount of a banker's note; in *Humphreys v. Humphreys*, 2 Cox 184, the bequest of all the stock possessed by the testator in the 8 per cents, being about £5000; were ruled to be specific legacies, and the receipt of the money by the testator an ademption of the legacy. The cases of *Douglass v. Congreve*, 1 Keen 410; *Kamp v. Jones*, 2 Keen 736; *Davis v. Morgan*, 1 Beaver 259; *Hays v. Hays*, 1 Keen 97, farther exemplify the same principle. The subject will also be found to have been very fully considered, and the authori-

ties up to that period (1823), examined by chancellor Kent, in *Walton v. Walton*, 7 John. Ch. Rep. 257; in which he held that a bequest of a testator's "right, interest and property in thirty shares, which he owned in the Bank of the United States," was specific. "A legacy of a debt," says he, "unless there is ground for considering it a legacy of money, and that the security is referred to as the best mode of paying it out of the assets, is as much specific as the legacy of a horse or any moveable chattel whatever. If the specific thing is disposed of or extinguished, the legacy is gone." In *Blackstone v. Blackstone*, 3 Watts 335, this doctrine received the consideration of our own supreme court, and it was there held that a bequest of "all *my* 250 shares of the capital stock which *I hold* in the Union Bank of Pennsylvania," was a specific legacy which was extinguished by a sale of the stock in the lifetime of the testator. The words "which I hold" in this bequest, were held by the court "to individuate the stock as a *corpus*" with sufficient precision to make the legacy clearly specific. This case was one of great apparent hardship to the legatees. It was admitted that the testator sold the stock only from an apprehension of danger of loss upon it; that he took a bond from the purchaser of it for the amount at which he sold it, declaring that the bond should go to the legatees in place of the stock; and that the bond remained wholly unpaid at the death of the testator. But say the court, "the legacy being a specific one, whatever was the motive for its extinction or change of being, whether to destroy it or preserve it for the legatees; and whatever be the evidence of such motive, it ceased to have the specific existence ascribed to it in the will, and neither the bond taken as a substitute for it, nor its value, can be demanded of the testator's estate." In the case before us, the legacy is described as "\$1000 of United States 6 per cent. stock or loan of 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 269." The words "standing in my name" have been held in *Barton v. Cooke*, 5 Vesey 461; *Norris v. Harvren*, 2 Madd. Ch. Rep. 280; *Sleech v. Thornton*, 2 Vesey senior 261; *Drinkwater v. Falconer*, ib. 623, as sufficiently identifying stock bequeathed, so as to make a legacy of it specific. Beside these words, we have in this case a precise description of the stock bequeathed, together with a statement of the number of

the particular certificate evidencing it; a minuteness of description leaving no kind of doubt as to the identity of the subject matter of the bequest, intended by the testator to be given to the legatee.

That a specific legacy of stock which has been sold by a testator before his death; or of a debt which has been demanded and received by him, is adeemed and extinguished, is not disputed. Nothing remains to which the words of the will can apply. The intention of the testator is immaterial in the ademption of the specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate. *Blackstone v. Blackstone, supra.*

But it has been strongly urged on us, that this is not a regular specific legacy, but one in the nature of a specific legacy;—one in which a given sum of money is bequeathed, with reference to a particular fund out of which it is to be satisfied; and that this class of legacies are never held to be adeemed or extinguished by the sale or other disposition by the testator of the fund from which payment is to be made previous to his death. That a distinction does exist, between a bequest of a sum of money referring to a security or debt for its payment, and a gift of the security or debt itself, is undoubted, although lord Thurlow in *Ashburner v. M'Guire*, seemed to have regarded it as a refinement. The leaning of courts of equity is always against regarding a legacy as specific. The will is always read with an inclination to hold a legacy general; and if there is the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund only, as that out of which in the *first* place he meant it to be paid, the legatee will have this advantage, that it shall be considered pecuniary, so as not to have the legacy defeated by the destruction of the security. *Channth v. Beech*, 4 Vesey 565-6; *Ambler* 568. The same legacies may be specific in one sense, and pecuniary in another: specific as given out of a particular fund, and not out of the estate at large; pecuniary as consisting only of definite sums of money, and not amounting to a gift of the fund itself or any aliquot part of it. *Smith v. Fitzgerald*, 3 Ves. & Beam. 5. The kind of legacy alluded to is what is termed in the civil law a demonstrative legacy, that is, a general pecuniary legacy with a particular security pointed out as a convenient mode of pay-



ment, where, although such security may be called in or fail, the legacy will not be adeemed.

Of this kind of legacy the case of *Kirby v. Potter*, 4 Vesey 478, is an example. There a legacy to B. of £100, out of my reduced bank annuities, 3 per cents., "was ruled to be a general and not a specific legacy, lord Alvanley holding the phrase, £1000 out of my reduced bank annuities," meant that the executor should raise £1000 by selling so much of that stock. *Sibley v. Perry*, 7 Vesey 522; *Le Guie v. Finch*, 3 Merevaile 49; *Deane v. Test*, 9 Ves. 146; *Fowler v. Willoughby*, 2 Sim. & Stewart 358; are cases determined on the same principle. The principle extracted from these cases is, that a sum of money bequeathed out of particular stock, is *prima facie* adjudged a money legacy, but liable to be considered a specific bequest of so much of the identical stock which the testator had, when a clear intention appears upon the whole will. The cases illustrating this distinction have been noticed, and their identity in principle with the present it seems to me, demonstrated. In *Barker v. Rayner*, 5 Madd. Ch. Rep. 217, it is said, that "when once it is determined that the legacy of a debt is specific and not demonstrative, that the only safe and clear way is to adhere to the plain rule, that there is an end of the specific gift, if the specific thing does not exist at the testator's death."

The judgment of the court being that this is a specific, and not either a general or demonstrative legacy, we will notice the remaining reasons urged against its being adeemed by the receipt of the money from government. It is said that this receipt by the testator was compulsory and not voluntary, and that the state of the fund was changed by act of law and not by the act of the parties.

At one period a notion certainly prevailed, that although a specific legacy of a debt or security was adeemed, where the testator received the debt specifically bequeathed at his own instance, that it was otherwise where the debt was paid him without his application. The cases of *Orme v. Smith*, 1 Equity Cases Ab. 302; *Partridge v. Partridge*, Cas. Temp. Talb. 228, seem to have been decided on this distinction. It has, however, been since entirely exploded. See *Ford v. Fleming*, 1 Eq. Cas. Abr. 302, *Ambler* 402, and the cases cited in *Roper on Legacies*, vol. i. p. 243; see also *Walton v. Walton*, 7 John. Ch. Rep.

265-6. There is no ground therefore for a distinction between a voluntary receipt by the testator of a debt specifically bequeathed, and one coerced by suit or demand. In both cases the legacy of the debt, so far as payment has been made, is extinguished.

There are cases in which the alteration of the fund by mere act or operation of law, has been held not to operate as an ademption of a specific legacy of the fund. Such a case is *Partridge v. Partridge*, Cases Temp. Talbot 226. There A. bequeathed to B. £3000, 3 per cent. consols. This fund was afterwards changed by act of parliament into one of a different description. The legacy was held not to be adeemed, because the alteration of the fund not being made by the testator but the legislature, the act was not allowed the effect of prejudicing the legatee. Suppose a case in which a legacy is given of stock in a particular bank, naming it; and afterwards by law the name of such bank is changed. This would be such an alteration of the fund by act of law, as would not work injury to the legatee of the stock. But the case before us is not one of this description. There is no alteration of the fund by act of law. The government of the United States owed the testator a debt for the payment of which the public faith was pledged to him. When due it was accordingly paid. This is no more a change of the fund by operation of law, than would be the payment of a bond or other debt owed to the testator, which he had previously specifically bequeathed by his will. The obligation to receive payment from the government, and to release it from farther payment of interest, was as much a contract on the part of the testator, as was the engagement of government to pay him interest until the debt matured, and the principal at that time.

The last ground on which the executor of Ludlam is sought to be charged with the payment of this legacy, has certainly nothing to recommend in natural equity. It appears that the executor on the 19th of February, 1830, filed an account of his trust in the register's office, charging himself with ten shares United States 6 per cents, par \$1000, as held in trust for James Ludlam the legatee. And that on the 27th of April, 1841, he filed a second account, in which he again charges himself with this loan as so held in trust. A copy of this account was trans-

mitted by him to London, accompanied by a letter addressed to the executor of James Ludlam who is deceased, in which he expresses his readiness and willingness to pay over the amount when required by proper authority.

From these grounds it is insisted that the executor is estopped from denying the claim of the legatee. It is manifest that the executor throughout has acted on the mistaken idea, that the legacy of the United States loan was not adeemed by its payment to the testator. A natural mistake certainly, seeing we have arrived at a different conclusion only after a laborious investigation. His mistake cannot compromise the rights of the residuary legatee, who is the real party in interest claiming against the alleged specific legatee. The testator's legacies must be paid out of his estate, to those to whom they by law pertain. Not to those to whom the executor supposes they belong. We are now distributing the personal estate of George Ludlam among those to whom *he* has bequeathed it by his will. None others can ask any part of it. If his executor has involved himself in any liability to a party claiming to be a legatee of any part of the estate, whom the law does not recognise as such, the executor may be answerable personally. But surely that can give such a party no claim against the estate of the testator, at the expense of those to whom it rightfully belongs. But it was entirely competent for the executor, when he came before the auditor on his final account, to ask to be discharged from his erroneous credit to James Ludlam, given in his original and final account. The whole account, both as to charge and discharge, comes before an auditor under a reference for settlement, adjustment, and distribution. The executor may be surcharged to any extent the proofs may justify. Why can he not discharge himself by showing clear and manifest overcharges against himself, made through ignorance, inadvertence, or mistake of law or fact? I can see no reason why he should not have this claim to mere justice. It is always a difficult task for an executor to sustain errors alleged to be made against himself in the statement of his accounts. The legal presumption is, that his liability is co-extensive with his own admissions. But when a case does exist, in which an executor can on a reference of his accounts, show clearly and conclusively that he has by mistake surcharged himself with what he is not legally liable for,

or that he has admitted a claim by a legatee which the latter has no right to, we can have no doubt of the right and duty of the auditor to settle and adjust the account before him according to truth and justice of the case.

The cases cited of *Skering v. Greenwood*, 4 Barn. & Cress. 281; *Bramstone v. Robins*, 4 Bingham 11; *Bresbane v. Dacres*, 5 Taunt. 143; are cases depending on the well settled principle, that if a person with a full knowledge of facts pays over to another claiming it as a right, money which he was not compellable by law to pay, he cannot on discovering his error recover it back, there being nothing against conscience in the other party retaining it. They are all cases where the party seeking to recover back the money, either by way of direct action or set-off, had actually paid the disputed sum over to his opponent under a claim of right. No case has been, nor do I believe can any be shown, in which it has been held that a party can recover from another money erroneously admitted to be due to the plaintiff; or that in an action brought on such admission, it is incompetent for the defendant to show that his admission of liability to the plaintiff was founded on a mere mistake, as to the legal claim of the latter to the sum demanded. Suppose instead of proceeding in this court, the representative of James Ludlam had sued at law under the act of assembly authorizing suits to be brought for the recovery of legacies; would the admissions in these accounts, that he held the proceeds of the government loan for the use of Ludlam, have concluded the executor from showing that the legacy had been adeemed and extinguished by the receipt of the loan from government by the testator before his death; and that his admission of liability was predicated on an error in law as to the effect of this payment and receipt? I cannot think so. But in this proceeding where payment is asked from the fund, and where the effect of admitting the claim would be to take from the residuary legatee what by law belongs to her, and give it to one who has no claim upon it, such a position is clearly inadmissible. The request for an issue is refused, because there is no state of disputed facts requiring it. The original legacy; the receipt of the subject of the legacy by the testator; the handing over the proceeds to the executor; the retention of it by the executor's banking-house until the testator's death; the payment of interest on it to

his widow; the admissions of James Ludlam's right to it in the accounts and correspondence; in short, every fact on which the claim is placed, are clear. The only question in the case arises from the principle of law flowing from these facts, however they are legally viewed. These principles are against the legatee, and in favour of the executor.

The remaining objection arises from the alleged irregularity of the appointment of the auditor. It is contended, that under the provisions of the 47th section of the act of 1834, and the 1st section of the act of April, 1840, such an appointment can only be made on the application of a legatee, and that the original appointment being in this case made on the application of the executor, is void. The literal directions of these laws seem to require all applications to compel the executors to pay and deliver over legacies, should be made by a legatee or other person interested in a legacy. But supposing that these laws give an executor no *status* in court to relieve himself from his trust, by having the claim of legatees ascertained by the decree of the court, still I consider under the circumstances of this case, the objection cannot prevail. After his appointment, the auditor proceeded to settle the account of the executor, and to assign the legacies to the different legatees, and reported the result to the court. The exceptant did not appear on that occasion. Afterwards, and after the auditor's report was filed, the exceptant applied to the court for an order directing the report made to be referred back to the auditor. This was accordingly done, and the exceptant appeared before the auditor and litigated his claim, which after a full hearing was ruled against him. After this course of procedure, it seems to me too late for the exceptant to complain that the auditor was not appointed on his motion. By this course he adopted the appointment as much as if he had originally moved it. If he had desired to object to the regularity of the appointment of the auditor, his true course was to have moved to quash it. After moving the reference back, and after appearing and presenting the claim to the auditor, it is too late to complain of any alleged defect in the original appointment. Such a course of proceeding is equivalent to an original application to compel payment or delivery of the legacy.

Another circumstance exists in the case, of some importance.

Although the counsel who moved the reference did so on the record on behalf of the executor only, yet he also represented the residuary legatee, and now desires on behalf of this legatee to validate, so far as his present affirmative action can do so, the proceedings of the auditor. The whole result of vacating our past doings would be to refer the case back again to the same auditor, on the formal application of the residuary legatee, from which no other than the present result could follow. Under all these circumstances, I think we should not interfere with the original appointment of the auditor.

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## IN THE COMMON PLEAS OF LANCASTER COUNTY.

[April Term, 1846.]

### BEAM v. FIRST METH. EPISC. CHURCH OF CITY OF LANCASTER.

1. Where a mechanic's lien was filed against a church edifice, and the commissioners appointed to define the extent of the ground necessary for the convenient site of the building, included in their report the grave-yard, which they recommended to be sold with the church, the court held that including the grave-yard was error.

LEWIS, president. This case comes before the court on exceptions to the report of commissioners under the act relating to mechanics' liens. The commissioners were appointed to "define the extent of ground necessary for the convenient use of the building," upon which the liens are alleged to exist. The building referred to is a church edifice; and the commissioners have included in their report the grave-yard, and also a portion of ground at present unoccupied, which they recommend to be sold with the church building, because it would be useful for the site of a "parsonage house."

Christianity is held to be part of the common law, and sir Edward Coke designates a building intended for the celebration of its rites, as the "mansion house of God." In this he had the authority of the Saviour, who designated the temple as "His Father's house," and drove out the "dealers in oxen and sheep," and "overthrew the tables of the money changers," because it was not lawful to make it "a place of merchandise." A religious corporation in this country stands in the place of the *parson* in England, who, as a corporation sole, holds the legal title to the estates of the church. But those estates could not, at common law, be seized under writs of execution directed to the sheriff. If upon a common *feri facias*, the sheriff returned that the defendant was "a beneficed clerk, and had no *lay fee* in his bailiwick," a writ was issued to the bishop of the diocese, in the nature of a *levari facias* or *fieri facias*, to levy the debt

and damages *de bonis ecclesiasticis*, and thereupon the bishop sent out a sequestration of the *profits of the benefice*, directed to the church wardens, to collect the same and pay them to the plaintiff till the full sum be raised; 3 Blackstone's Commentaries 418. Even the king, who had always the right to seize in execution the lands of his debtor, could not order the sheriffs to levy upon ecclesiastical estates, but was obliged to have recourse to the writ of sequestration, directed to the bishop, under which the latter was bound to take care that out of the revenues of the church the duties of the church should be provided for; 3 B. & P. 327. And after the statute of Westminster 2d gave the remedy of *elegit* to the subject, it was considered that the statute did not authorize the seizure of the glebe, belonging to the parsonage, nor of the church-yard, for these were each *solum deo consecratum*; Gilbert on Executions 40; 2 Cruise's Digest 72; Jenkins' Rep. 207; 29 Edw. 3, 44; 21 Edw. 4, 45; 3 B. & P. 327-8. Upon the same principle it was held that the assignees of an insolvent parson could not recover, in an action for the use and occupation of the glebe land, parish church, &c., although they were included in the schedule and assignment; 3 B. & P. 321.

It is true, that in the country from which we derive our common law, a particular form of worship is favoured by the government; while, under our own free institutions, all Christian denominations are entitled to equal privileges; but the obligation to support rational piety is common to all nations, because it is "the firmest support of lawful authority," and the highest "pledge of the people's safety." Vattel 51. It is evident, from what has been said, that if we construe the lien law to extend to houses for worship, or permit religious corporations to be dispossessed of their places of devotion, by means of judicial process; we deny to religion the protection which it received under the laws of our English ancestors, and we must draw upon our own practices for the precedent. The facilities for administering justice, for travelling, for transportation of merchandise, and for healthful recreation, are so far protected that a court-house, a jail, or a public square, could not be sold by the sheriff. And, until the act of the 16th June, 1836, gave to sequestrators "*all* the powers of trustees appointed under the law relating to insolvent debtors," it was generally thought that neither turnpike roads, rail-roads, nor canals, could be sold for the payment of debts. And, even in cases of a sale of these works, under the general powers conferred upon the sequestrators, there is a careful provision, by virtue of which, in cases where "the public have an interest," the court may order that "the revenues shall be applied, in the first place, to keeping the works in repair."

The revenues of a religious corporation, and the *profits* of all property held by it, are doubtless within the reach of the creditor, by appropriate process. And it is well worthy of consideration, whether all who deal with it do not contract upon the credit of these resources alone? But, as this is a question of great importance, it is left for farther consideration; because we can dispose of this case, for the present, upon another point. A lien is claimed against the grave-yard. The sale by the sheriff, of edifices dedicated to the worship of God, is sufficiently repugnant to the feelings of a Christian people, without making "merchandise," also, of their places of burial. The ground, in this case, consists of two lots, fronting on Walnut street, which were dedicated to the purposes of Christian burial about fifty years ago. On the faith of that dedication, many families have deposited therein the remains of their relatives; and many grave-stones and monuments have been erected to their memory. Within a few years, the congregation purchased a lot, fronting on Duke street, on which the new church building has been erected. It is true, however, that the rear of the church lot adjoins upon the rear of one of the grave-yard lots.

It is not possible to believe that the congregation, in making the new erection, intended to hazard a change of ownership or uses, so far as respects the burying-ground. Nor is it probable that the honest mechanics engaged in erecting the new building, imagined they were acquiring a lien on the grave-yard, with its tombstones, and monuments, and mouldering remains. It is fair to presume that neither party intended either to disturb the repose of the dead, or to do violence to the feelings of the living.

Although "burial and the administration of the sacraments" are usually considered the distinguishing characteristics of a parish church in England, (2 Inst. 363, 2 Com. Dig. 304,) they are not always its constituents under our system of toleration and diversity of opinion and practice. In this case the ground was used for the purposes of sepulture long before the building was erected, and it may be equally useful to the congregation after the new building shall be sold. It is not necessary for the enjoyment of the building, "for the purpose for which it was designed." The building was designed for the worship of God—the ground for the burial of man; the one for the edification of the living—the other as a receptacle for the dead; the purposes, although frequently combined, are entirely distinct in their nature. The lot which fronts on Duke street is quite sufficient for the convenient enjoyment of the building as a place of worship. The commissioners erred in including the grave-yard in their report, and for that cause the report is set aside.



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VOL. V.

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## SELECTIONS FROM 1ST VOL. OF PENNSYLVANIA STATE REPORTS.

**ASSIGNMENT.** An equitable assignment of a chose in action, being an executory contract, must have a consideration to support it, without which equity would no more execute it than the law would make the breach of it a subject of compensation. *Kennedy's Executors v. Ware*, 1 State R. 445.

2. Such an assignment in consideration of natural love and affection is void; and a promise, predicated on the rescission of an assignment, is also void. *Ib.*

**BILLS AND PROMISSORY NOTES.** In the absence of fraud, mistake, misrepresentation, or other ground of equitable defence, it is not competent for the drawer of an accommodation note to prove that it was discounted for the depreciated notes of another bank: the ground of usury not having been taken in the pleadings, or at the trial, or appearing to have been brought to the notice of the plaintiff. *Keim v. Bank of Penn Township*, ib. 36.

**CANAL.** Under the 7th section of the act of 10th of April, 1826, where an ascending and descending boat have to pass each other, near to, or at a narrow place in a canal constructed for the purposes of inland navigation, under the laws of this commonwealth, it is the duty, as between themselves, of the ascending boat to wait at such distance from such narrow place, as to permit the descending boat to pass with safety; and if any injury be sustained by the descend-

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ing, through a non-compliance with the law on the part of the ascending boat, the latter is liable in damages for such injury. *Sheerer et al. v. Kissinger et al.*, ib. 44.

2. But where the boat of a third party, moored properly to the bank of the canal for a lawful purpose, is concerned, and the ascending boat will not comply with the directions of the act of assembly aforesaid, it is the duty of the persons having the charge of the descending boat, to keep her at a proper distance, and under their control, so as to insure safety; and if through culpable negligence, or a want of due caution in passing each other, a collision takes place, through and by which, the descending boat is driven against and staves in such third boat, the owners or persons in charge of the descending boat are answerable in damages for the injury sustained by such third boat. *Ib.*

3. *Qu.* Whether the plaintiff would not have been entitled to indemnity from the owners of the ascending, as well as of the descending boat, if he had joined them in the suit? *Ib.*

CONSTABLE. A purchaser at a sheriff's or a constable's sale, who participates in the transaction only by purchasing the goods, although he knows of the illegality of the sale, or that the goods did not belong to the defendant in the execution, is liable to the owner in replevin, but not in trespass. *Ward v. Taylor*, ib. 238.

2. To maintain trespass, it is absolutely necessary that the plaintiff, whether the property be real or personal, must be in the actual possession, or he must have the right of taking possession at the time of the trespass. *Ib.*
3. If a constable at a sale sells any portion of goods without levy or advertisement, he is liable therefor to the owner. *Ib.*
4. When there are several defendants, the jury should find as to all. Where they do not, the irregularity may be cured by entering a *nolle pros.* in this court, or in the C. P., the record being remanded for that purpose. *Ib.*

DEED. A memorandum made on a deed after its execution and delivery, as to what was the extent of the grant, is of no avail against persons holding by title from the grantor. *Gregory v. Griffin*, ib. 208.

2. By accepting the deed all prior parol contracts are merged. *Ib.*

EVIDENCE. A plaintiff is a competent witness to prove that

a deposition was taken at the time called for in the notice and rule. *Bluck et al. v. Moore*, ib. 344.

**EXECUTORS AND ADMINISTRATORS.** One of several administrators, if he believes the continuance of a lease reserving rent, for the annual payment of which his intestate had bound himself as surety in a bond, to be injurious to the estate, may, without joining his co-administrators, make an agreement by which the lease was to be determined and given up; and such contract being entered on the lease and bond binds the estate, and may be enforced by an action of debt on the bond against all the administrators. *Rick's Administrators v. Gilson*, ib. 54.

2. In such action the record of a judgment obtained against the tenants or lessees for not performing their covenants in the lease, and a *fi. fa.* issued thereon, returned "*nulla bona*," is evidence for the plaintiff. *Ib.*

**HUSBAND AND WIFE.** A husband who comes into court as a lien creditor, for his wife's legacy charged on land which has been converted into money by a judicial sale, so far makes it his own by demanding it, as to let in a set-off of his proper debt; but not to disappoint her right of survivorship in the event of his death before distribution. *Donaldson v. West Branch Bank*, ib. 286.

2. A husband's disclaimer of conversion to his own use at the time of reducing his wife's chose in action to possession, may be established by his subsequent admissions proved by the testimony of witnesses; but the admissions must appear to have been deliberate, positive, precise, clear, and consistent. Held, therefore, that a husband's declaration that he has certain money of his wife's; that he would pay it back to her, and that it should not be said he has any of her money; or that he wanted only the use of it for the present; and that it would go to her children, or that they should have it—are insufficient to establish her right of survivorship. *In re Gray's Estate*, ib. 327.

**INTESTATE.** A widow's lien for her interest on a third of the valuation of her intestate husband's land, is not divested by a sheriff's sale on a judgment against any one or all of his children, or collaterals. *Sicar's Appeal*, ib. 92.

2. Where, therefore, part of the land, which had been decreed

on partition by the orphans' court to a son, who gave security to the widow and other children, was sold by the sheriff on a judgment against the son; it was held, that the proceeds should be applied to the judgment against the son, and that the purchaser should hold subject to the lien of the intestate's creditors, as well as to the payment of the interest on the widow's third during her lifetime, and the principal at her death. *Ib.*

3. But a judicial sale, at the suit of any one of the intestate's creditors, passes the estate clear of the widow's incumbrance. *Ib.*
4. The omission to tender a refunding bond cannot be pleaded in bar to an action for a distributive share of an intestate's estate. *Logan v. Richardson et ux.*, *ib.* 372.
5. The plaintiff's claim in such action is not barred by the 18th section of the intestate act of the 19th April, 1794, nor by the statute of limitations, unless where a *bona fide* distribution has been made, without notice. *Ib.*
6. Lapse of time, however, may raise a presumption of payment. *Ib.*

**JUDGMENT.** A defendant in a judgment, who pays to the prothonotary the debt and interest due on such judgment, pays it in his own wrong. *Tompkins et al. v. Woodford*, *ib.* 156.

2. Such payment is not good, the prothonotary having no authority to receive it. *Ib.*
3. The ratification of such unauthorized act of the prothonotary does not fall within the sphere of the general authority or power of an attorney at law in this state, and will not, therefore, validate such payment, without the assent, express or implied, of his principal. *Ib.*
4. Where there is a judgment against two joint defendants, which remains unsatisfied until one of them die, his personal property is discharged from execution; but the plaintiffs may have execution of the land and tenements of such deceased party, if any he had, which were bound by the judgment at the time it was obtained. *Stiles et al. v. Brock & Co.*, *ib.* 215.
5. In such case a writ of *scire facias* is erroneous, which calls upon the administrator of the deceased party in the judgment to show cause, why the plaintiffs should not have execution

against the "*goods and effects*," lands and tenements of the said deceased, in his hands: the words "*goods and effects*" should have been omitted, and the directions of the writ confined to the lands and tenements of the said deceased, which were held and owned by him, at the time of the rendition of the judgment. *Ib.*

**JUSTICES OF THE PEACE. TENDER.** A defendant in a suit before a justice of the peace, if he intends to rely on the ground of a tender for the purpose of avoiding the payment of the costs of a subsequent suit, should plead it before the justice, having the money there, and at the same time offering to pay it to the plaintiff; and to bring it into court on his appeal, upon putting in a plea of a tender of the money before suit commenced. *Seibert v. Kline*, *ib.* 38.

2. To exempt a defendant from the payment of costs, and to entitle him to recover them from the plaintiff according to the terms of the second proviso of the act of the 9th of April, 1833, where the plaintiff is the successful party, it is necessary that the defendant should have offered, either on the trial of the cause before the justice, or before the appeal was taken, to give the plaintiff a judgment for a sum equal to, or greater than that which the plaintiff, in the event of his suit, recovered; and it is the duty of the justice to enter such offer on the record. *Ib.*

3. The only evidence of such offer is the record: and it is error, if the court determines whether such offer were made or not, by parol, or other inferior evidence. *Ib.*

4. If a justice neglect to enter such offer upon his docket, he may be answerable to the defendant for any loss or injury which he may sustain by reason thereof. *Ib.*

5. To discharge a defendant from the payment of costs on an appeal, when he has reduced the judgment in court, he must have made his offer to confess judgment, during the trial of the cause before the justice, or before the appeal taken, and have it entered on the justice's record. *Bogart v. Rathbone & Wilson*, *ib.* 188.

6. The offer to confess judgment after the appeal is taken, and before the justice has made out his transcript of the appeal, is too late. *Ib.*

**LANDLORD AND TENANT.** The act of the 21st of March,

1772, which gives a summary remedy to a landlord, only applies to leases on which a certain rent is clearly and distinctly reserved; and not to cases where the rent reserved is so uncertain as to require the intervention of a jury to render it certain. *M'Gee v. Fessler*, ib. 126.

2. All the facts necessary to give jurisdiction should be set out in the proceedings: and if it do not appear on the record that the lease or demise was "*under certain rents*," or "*a certain yearly*," or "*other rent*," the proceedings of the justices and inquest will be set aside. *Ib.*
3. The court may, in special cases, after a writ of possession, refuse a writ of restitution. *Ib.*

**PARTITION.** It is error for a jury of inquest of partition and valuation, to include in its proceedings lands held adversely to the heirs, and such error will set aside the inquisition. *M'Masters v. Carothers*, ib. 324.

2. A deputy sheriff cannot depute another to select and summon a jury of inquest, nor will the subsequent assent of parties validate such act. *Ib.*

**PARTNERSHIP.** Though a partnership for a single transaction, or in a contract upon a canal, mutually terminates with the completion of the purposes for which it was formed, yet as between the partners themselves and others, it continues for the purpose of winding up its affairs. *Petriken v. Collier*, ib. 247.

2. Thus when partners, who were contractors, received their final estimate, and some days after, one of them gave a note in the name of the firm, to a person who had been in their employ, for the amount due to him, for labour, &c. upon the contract, it was held that he had as full power to give such note as he had at any previous period. *Ib.*
3. A compensation for services in the form of a commission on profits, creates no such interest in the concern as constitutes partnership. *Dunham v. Rogers*, ib. 255.
4. Held, therefore, that an agreement by a manufacturer to furnish wooden handles made to order, to a country merchant, at a tariff of prices to be paid out of the store, on the proceeds of the handles, the manufacturer finding the labour and stuff, and receiving a further compensation for skill and the rent of the store-house, in the form of a commission of 50 per cent.

on the net profits of the whole, does not constitute a partnership. *Ib.*

5. Held, also, that if there ever was a partnership in the store, and in the handles furnished, it would not extend to the procurement of the stuff, and, consequently, that the merchant would not be liable to a creditor of the manufacturer for the price of it. *Ib.*

**PURCHASE MONEY.** A judgment for residue of purchase money, entered up a day after the vendor had conveyed the legal title, does not exclude a prior judgment against the vendee. *Watt v. Steel*, ib. 386.

**REPLEVIN.** A purchaser at a sheriff's or a constable's sale, who participates in the transaction only by purchasing the goods, although he knows of the illegality of the sale, or that the goods did not belong to the defendant in the execution, is liable to the owner in replevin, but not in trespass. *Ward et al. v. Taylor*, ib. 238.

**SLANDER.** It is actionable to say of a farmer, falsely and maliciously, that "*the sheriff will sell him out one of these days, and claims against him not sued will be lost;*" the credit which he has being a means to support his business. *Phillips v. Hæfer*, ib. 62.

**TAXES.** Money payable under articles of agreement, and bearing interest, is taxable for school purposes. *Vægtly v. School Directors, &c.*, ib. 330.

**USAGE.** The number of bricks laid in a pavement may be computed by allowing a given number to the square yard, according to the usage of the craft, proved by the testimony of a paver. *Pittsburgh v. O'Neill*, ib. 342.

**VENDOR AND VENDEE.** Where a sale was made, which was fraudulent under the statutes 13 and 27 Eliz., and the grantor remained in possession by his tenants, and during that possession the property was sold at sheriff's sale as the property of the grantee: Held, that the possession of the grantor by his tenants was constructive notice to the purchaser at sheriff's sale of the fraudulent transfer of the property by the grantor to the grantee. *Hood v. Fahnstock*, ib. 470.

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## IN THE QUARTER SESSIONS OF PHILADELPHIA COUNTY.

[May 11, 1846.]

### COMMONWEALTH v. TORAM.

1. The defendant was indicted for forcible entry and detainer, but convicted only of the forcible detainer. The judgment was arrested, on the ground that the indictment did not aver the prosecutor's estate or interest in the premises, but only a bare possession.

PARSONS J. This case now comes before us on a motion in arrest of judgment. The first count in the indictment charges that the defendant, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously did enter into the premises [describing them], then being *in the peaceable possession* of one Edward C. Cole, and with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously did expel, remove, and put out the said Cole of the premises; and when so expelled, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously has kept out of the same, &c.

The next count charges that the said Edward C. Cole was possessed of a certain messuage or tenement [describing it], *for a certain term then still to come and unexpired*, and being so possessed thereof, the defendant forcibly entered, &c., and expelled the said Cole, and having thus expelled him, with force detains the premises, &c. The jury found the defendant not guilty of the forcible entry, but guilty of the forcible detainer of the premises, and the counsel for the defendant has moved in arrest of judgment, upon the ground that nothing but a *bare possession* is averred to have been in the said Cole; and neither his seisin or estate, nor his interest in the premises, nor the nature or character of the possession of the prosecutor, is set forth upon the record, and therefore no sentence can be passed upon the defendant under the present finding of the jury.

It is contended by the counsel for the defendant, that this is an indictment under the various English statutes in relation to forcible entries and detainer, which are in force in this state, and that the adjudications both in England and Pennsylvania upon those statutes has been, that the indictment must show



that the party who is put out of possession was either seised of a freehold, or that he was possessed of such an estate as will bring him within the provisions of some of the acts of parliament upon the subject.

It is admitted by the counsel for the commonwealth, that such is the law where the indictment is under the British statutes, but they contend that this indictment is not under those statutes, but is an indictment at common law, hence that it is not necessary to aver the character of the possession of the prosecutor. Therefore the inquiry arises, whether the indictment can be sustained at common law, and will warrant a judgment on this verdict, or whether it can be considered sufficient under any statute in force in Pennsylvania.

It seems to be laid down in the books, that at common law, and before the passing of the statutes in relation to forcible entry and detainer, if a man had a right of entry upon lands or tenements, he could enter with force and arms, and detain his possession by force where his entry was lawful. (See Dall. Just. 297; 1 Haw. P. C. 274; 1 Russ. on Cri. 408.) But it was decided in England near a hundred years ago, that an indictment would lie at the common law for a *forcible entry*, alleging sufficient actual force; although all the writers upon the subject concur in saying that such prosecutions are generally brought under the acts of parliament which have been passed in relation thereto. The first case that I have been able to find where the point was expressly decided, is *Rex v. Bathurst*, Sayer's Reps. 225. There was a demurrer to the indictment. The first count charged a forcible entry into a messuage in the peaceable possession of the prosecutor, and the court were of the opinion that this count was not good under the statute, because it did not show what estate the prosecutor had in the premises, for he might be but a tenant at will, which was not an offence against the statute. But Foster j., was of the opinion, that although not good under the statute, still he said a forcible entry was an offence at the common law, and not one created by the statute, and that the statute by ordering the possession to be delivered, gave a more speedy remedy.

The case of *Rex v. Stott*, 3 Burr. 1698, and the case of *Rex v. Bake and others*, 3 Burr. 1731, seem to lay down the same doctrine, that an indictment for forcible entry can be supported

at common law, although in the last case justice Wilmot says they are generally brought on the acts of parliament. - And this learned judge farther remarks, that it is necessary to state the nature of the estate, because there must be restitution; and for the same principles see Yelv. 165; 1 Vent. 306; 1 Sid. 102. These cases clearly show that an indictment for a forcible entry may be sustained at common law; yet none of them so far as to say, that where the entry was peaceable, and the accused only detained the possession by force, that he could be convicted of the offence; and none go so far as to say the indictment is good, when neither the estate or the nature of the possession is alleged; and that is the question now before us. For the purpose of fully elucidating this point, it seems to be necessary to examine the English statutes which are in force in this state, and our own act of assembly upon the subject.

The first statute which I find that has relation to it is that of 2 Edw. III., generally called the statute of Northampton, which enacts, if there be any use made of arms to strike terror into persons upon whom a forcible entry is made, any justice of the peace, &c., may both seize the arms for the king's use, and also imprison the offenders, *but not restore the party injured to his possession*. This statute is not in force in Pennsylvania. The next act of parliament on this subject is that of 5 Rich. II. c. 7, and is in the following words: "And also the king defendeth, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law; and in such case not with strong hand nor with multitude of people, but only in a peaceable and easy manner. And if any man from henceforth do the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." This statute is not reported by the judges of the supreme court to be in force, but is referred to by Mr. Roberts in his Digest of the English Statutes.

We are told by many of the text-writers, that it was found by experience that this statute was not sufficient to provide against the mischief intended to be redressed by it, and its inefficiency is pointed out in a number of particulars, and among others that it made no provision *against forcible detainers*, and that it was thought necessary to supply this and other defects by additional laws. (See 1 Haw. P. C. 275; 1 Russ. 408-9.)

Hence the statute of 15 Rich. II. was passed, and this act is in force here. This act authorized a faithful execution of the statutes against forcible entries, and where forcible entries had been committed and complaint thereof was made, the justices of the peace were empowered to take sufficient power of the county, and go to the place where the force was made, and if they found that any held such place forcibly after entry made, to commit the offenders to the next jail, and there to abide till they made fine and ransom to the king. Of this the justices were to make a record, and that was traversable. But it was found, say the law writers, that this act was likewise defective in many respects, in not giving a remedy against those who were guilty of a *forcible detainer* after a peaceful entry, and in not giving the justices of the peace any power to restore the party injured by such force to his possession; hence the statute of 8 Hen. VI. c. 9, was passed, which provides, that from henceforth when any do make forcible entry in lands or tenements or other possessions, or them hold forcibly after complaint made within the county where such entry is made, the justices shall have power to cause the statute to be executed, giving them authority to inquire of the forcible entry; and whether they were held by force, and when so found, authorizing them to reseise the lands, &c., so entered or held by force, and put the party thus holding out of possession. It also gave authority to mayors, justices of the peace, sheriffs, and bailiffs to remove such entries. It also provides, that where any one had held his possession by force, of lands whereof his ancestor was seised, and had continued in possession for the space of three years or more, they should not be liable under the provisions of that act.

This statute is in force in Pennsylvania, and prosecutions for forcible entry and detainer are generally brought in pursuance of its provisions. The statute of 31 Eliz. c. 11, gives the right to the party prosecuted to traverse the finding of the justices, and if found against him, subjects the individual convicted to the costs and damages. But in the construction of these statutes, it was a question whether a lessee for years or copyholder being ousted by the lessor or lord, could have restitution; hence to remove this doubt it was enacted by 21 Jac. I. c. 15, that where the judges or justices by the acts of parliament then in force, were authorized to give restitution of possession unto tenants of any

estate of freehold, of their lands or tenements which shall be entered by force, shall by reason of that act have the like and the same authority upon indictment of such forcible entries or forcible withholding to give restitution of possession, unto tenants for term of years, tenants by copy of court roll, guardians by knight service, tenants by elegit, statute merchant and staple, of lands or tenements by themso holden, which shall be entered upon by force or holden from them by force. It is believed these are all the British statutes on this subject which are in force in this state. Then comes our act of assembly of 1700, which provides, that "whosoever shall violently or forcibly enter into the house or possessions of any person within this province or territories, being duly convicted thereof, shall be punished as a breaker of the peace, and make such satisfaction to the party aggrieved as the circumstances of the fact will bear."

In the construction of the English statutes it is well settled, that under the stat. of 8 Henry VI., the indictment must show that the party who is put out of possession was seised of a freehold, in order to bring him within the purview of that statute; so also on an indictment under the statute of 21 Jac. I. c. 15, the record must show that the party injured was possessed of such an estate as will bring him within the provisions of that act. (1 Haw. P. C. 284.) Therefore it was ruled, that where an indictment sets forth that the party was possessed, or that he was possessed for a certain term without adding that it was for years, it is not good; for in the first case it might be intended, that he was possessed only by virtue of a lease at will, and in the second that he was possessed of a term for life; in neither of which cases would he be within the benefit of the statute of 21 Jac. I. (See the *King v. Holmes*, 1 Mod. 73; the *King v. Dorny*, Salk. 260; *Le Roy v. March et al.*, 1 Sid. 102; 1 Haw. P. C. 285; 1 Russ. 422.)

Such have been the decisions of the courts in this state; hence as early as 1792 it was ruled, that when an indictment only averred the possession of the prosecutor for a term of years, it was held it could not be sustained. (*Commonwealth v. Elder*, 1 Smith L., note p. 3; and the case of the *Commonwealth v. Burd*, 6 S. & R. 252, seems to be full to the same point.) It is therefore manifest from the adjudications upon these statutes, both in England and this state, that this indictment cannot be

sustained under them, because the material averment as to the possession is not contained in it.

The next question which arises, can it be sustained under our act of 1700? I think it cannot; for it must be borne in mind, that this statute only provides for those who *forcibly enter* upon the lands of another; and it is a fundamental principle, that in construing penal statutes, courts are required to construe them strictly. Therefore no offence can be said to be made punishable by any statute, unless it is expressly made penal thereby. In the case of the Commonwealth v. Rogers, 1 S. & R. 124, it is said by chief justice Tilghman that a forcible entry and a forcible detainer are distinct offences, although they be charged in the same indictment. And in the case of the Commonwealth v. Burd, before cited, chief justice Gibson observes, that our statute has never been construed to be more extensively remedial than the stat. 5 Rich. II. c. 7, of which it has been held with us to supply the place. It was never pretended that the statute of 5 Rich. II. applied to *forcible detainers*, but we are informed by the highest authority, that the statute of 15 Rich. II. was passed to remedy this defect, inasmuch as the former statute made *no provision against forcible detainers*. (1 Haw. P. C.) From this view of the subject it is clear that this indictment cannot be sustained, nor will it justify the court in rendering a judgment on this verdict under our act of assembly.

The only remaining inquiry is, is this indictment good at common law, or in other words, was *forcible detainer* an offence at common law? No text writer which I have seen, lays it down as an elementary principle, that a forcible detainer was an offence at common law. In none of the numerous cases cited above, which decide that a *forcible entry* is an offence at common law punishable by indictment, is it ruled that forcible detainers are; but all the judges seem to speak of it as an offence punishable by statute. And I think it may be fairly inferred from the opinion of Foster j., in the case of Rex v. Bathurst, Sayer 226, such was his view of the subject. The ground on which it was adjudged by the courts in the case of Rex v. Bathurst, Rex v. Storr, and Rex v. Bake et al., that a *forcible entry* was an indictable offence, seems to be because it

was a breach of the public peace, and therefore the offender was liable to punishment; while at the same time it is said by all the text writers, that at common law, if a man had right of entry in him, he was permitted to enter with force and arms, and to detain his possession by force when his entry was lawful. (3 Bac. Abr. 248, 1 Haw. P. C. 274.) Now it is easy to perceive why it should be an offence, a breach of the peace, to enter with force, even when one had the right of entry, yet it would be no offence to retain the possession by force where he had entered peaceably, if such entry was lawful, in the absence of any statutory provisions upon the subject. And such it seems to me was the opinion entertained by the courts in England, when the various acts of parliament were passed. Now if a forcible detainer was an offence at common law, why was the act of 5 Rich. II. c. 7, defective? Hawkins tells us, because it made no provision against *forcible detainers*; and for this reason subsequent statutes were passed. Now if it had been thought that a forcible detainer was an offence punishable at common law by indictment, why should these statutes have been passed? It seems to me clearly it could not have been, or some case could be found in the reports showing that it had so been decided. So far from it, we find it laid down as an elementary principle, even after the passage of these statutes, that "if a man be gotten peaceably into *his own*, it seems he may defend it by force." (3 Bac. Abr. 253.) I presume it means where one has the clear, undoubted right to the possession, and has obtained it peaceably and has the best claim to retain it, then only may he so retain the possession by force. But whatever may be the law in England, I consider the question settled in Pennsylvania. In the case of the *Commonwealth v. Burd et al.*, these defendants were convicted on an indictment similar to the present, and the court of quarter sessions sentenced them to pay a fine of one dollar each and the costs; and awarded that the property should be restored by writ of restitution to the prosecutor. But the supreme court reversed the judgment. And the language used by the present chief justice in his concluding remarks, seems to be conclusive against the commonwealth in the present case. He observes: "I see no difference, however, between that part of the sentence which punishes the public offender and that which redresses the

private injury, for both constitute one whole; and those facts that entitle the prosecutor to his private remedy, are precisely those which constitute the public wrong; they must therefore be stated with legal precision for every purpose." It seems to me that the only public offence is the forcible detention of the premises, and the only punishment for a mere forcible detainer is an award of restitution.

But it has been alleged by the counsel for the commonwealth, that they do not ask an award of restitution under this record, only a sentence against the defendant; but what kind of sentence they have not informed the court in argument. In the case just cited, there was a conviction of both the offence of forcible entry and forcible detainer.

And yet because the indictment was defective, the court set aside the entire judgment. If the argument of the counsel for the commonwealth be sound, that the present indictment is good at common law and would support a sentence of a fine, surely the supreme court would not have reversed the entire judgment in the case of the *Commonwealth v. Burd*, but would only have set aside that part which directed the issuing of the writ of restitution. But this they did not do, upon the ground that the facts which gave the prosecutor his private remedy, were what constituted the public offence. And such is undoubtedly the sound principle of law in relation to forcible detainers; and if the offence itself is defectively stated in the bill of indictment, no sentence can be passed upon it.

If we do not award a restitution of the premises, it is difficult to know what should be the sentence. If the offence of which the defendant is found guilty is not one at common law, then he cannot be adjudged to pay a fine or be imprisoned. If the indictment is not good under the statutes relating to forcible entry and detainer, then we cannot inflict the punishment imposed by those statutes for this offence.

From a critical examination of the authorities, it is difficult to see how a judgment can be rendered on this verdict. If there is any offence averred on the record, of which the defendant is found guilty, it is one under the English statutes on this subject. Such being the view entertained by us, the decision of the supreme court in the case of the *Commonwealth v. Burd*, is certainly conclusive that such an indictment is not good, and

that no judgment can be rendered upon it. Therefore the judgment in this case must be arrested.

Counsel for the commonwealth, *J. Murray Rush.* For the defendant, *G. W. Barton.*

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IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF LANCASTER.

BURK V. BEAR AND MYERS, ADM'RS. OF HUBER, DECEASED.

1. A departure in pleading, is a defect of substance.
2. When the declaration in covenant, alleged an agreement by the plaintiff to give the defendant a good title on a day mentioned and averred performance, and the replication stated certain acts of the defendant by reason of which the plaintiff did not give such title at the time mentioned, this was held to be a departure.
3. So, where the agreement was to give a good title, free from incumbrances, and the declaration averred performance, and the replication stated the failure of the defendant to pay the money on the day, alleging that as the reason, why the incumbrances were not discharged—this is a departure.
4. A *protestando* is of no avail in the cause in which it is taken. A defective *protestando*, does not vitiate the plea to which it is attached, though shown for cause of demurrer.
5. A declaration in covenant for not paying the purchase money of land, which the plaintiff had covenanted and averred, that he tendered himself ready to convey, is fatally defective in not averring a title in the plaintiff to the premises.
6. After a party has once already been permitted to amend on demurrer, the court will not allow him to amend on a second demurrer, especially after argument and judgment entered thereon.
7. To amend the declaration by inserting an averment of title in the plaintiff, is an amendment of substance; and a motion for such an amendment, after judgment in demurrer, is warranted neither by the common law, the English statutes of amendment and jeofails, nor the act of the 21st March, 1806.
8. The act of the 21st March, 1806, alters the law on the subject of amendments, in no respect except as to time, authorizing them on the trial as well as before, and being mandatory to the court in their allowance.

HAYES J. The plaintiff in this case, has brought an action of covenant against the defendant, for the breach of the covenant, contained in certain articles of agreement between them, made on the 26th February, 1817; by which, in consideration of the sum of \$5,500, he sold and was to give the defendant, his heirs, &c., a good title, on the 1st day of April next ensuing, with peaceable possession, for ten acres of land in the town of Millersburg, whereon are a tavern and other buildings, &c.; and the defendant was to pay him therefor \$3,500, on that day,

and \$2,000 in one year thereafter : and the parties bound themselves to perform and fulfil all the covenants in the said articles in the penal sum of \$11,000.

The declaration averring, that the said Peter Burk hath always on his part kept and performed his agreement aforesaid, proceeds to assign the breach in the following manner: "Yet *protesting* that the said John Huber hath not performed, fulfilled, or kept any thing in the said articles of agreement contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning thereof, the said Peter Burk saith, that the sum of \$3,500 and the sum of \$2,000, were not (and are not yet paid to him) at the respective times mentioned in the said articles of agreement by the said John Huber, according to the tenor and effect of the said agreement on his part, although he the said Peter did, on the 1st day of April then next ensuing the date of the said articles, tender unto the said John Huber, a good title for and possession of the said ten acres of land and tavern house with the stove in the bar-room, and premises thereunto belonging. And so the said Peter Burk, in fact saith, that he the said John Huber (although often requested so to do) hath not kept his said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said Peter Burk, hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said Peter Burk, \$11,000, and therefore he brings suit, &c."

To this declaration, the defendant, on the 17th June, 1825, pleaded payment, with leave, &c. and performance with leave, &c., and the plaintiff replied, *non solvit*, and that the defendant had not performed his covenants.

On the 14th June, 1830, the defendant also filed by leave of the court, the following additional plea: "And the said John Huber comes and defends the wrong and injury when, &c., and says, that the said Peter Burk ought not to have and maintain his aforesaid action thereof against him, because he says that the Pennsylvania Bank, indorsee of Abraham Hershey, payee of Peter Burk, on the 12th day of September, 1816, at the county aforesaid, recovered judgment in the court of common pleas for the said county of Lancaster by the award of arbitrators under the provisions of the act regulating arbitrations,

passed the 20th March, 1810, against the said Peter Burk for a certain debt of \$463 35½, as also \$18 79 for the costs of the said Pennsylvania Bank in the said suit, whereof the said Peter Burk was convicted, as by the record and proceedings thereof now remaining in the said court of common pleas of August term, 1816, No. 607, more fully appears. And the said John Huber farther avers, that a certain Christian Kauffman for the use of Henry Carpenter in the said court of common pleas, by the consideration and judgment of the said court, on the 24th day of April, 1815, at the county aforesaid recovered as well a certain debt of \$100, with lawful interest thereon from the 1st day of March, 1813, amounting to \$112 90, as also \$7 96½ for the costs of the said Christian Kauffman for the use of the said Henry Carpenter, in the said suit, whereof the said Peter Burk was convicted, as by the record and proceedings thereof, now remaining in the said court of common pleas of January term, 1815, No. 173, more fully appears. And the said John Huber farther avers, that the United States of America in the said court of common pleas by the consideration and judgment of the said court, on the 25th day of November, 1816, at the county aforesaid, recovered as well a certain debt, of \$150, as also the sum of \$11 45 for the costs of the United States in the said suit, against Michael Flinn, the said Peter Burk, and Jacob Bletz, whereof the said Michael Flinn, Peter Burk, and Jacob Bletz were convicted, as by the record and proceedings thereof, now remaining in the said court of common pleas of November term, 1816, No. 329, more fully appears: And the said John Huber farther avers, that the said three judgments were liens against the real estate and premises in the plaintiff's declaration mentioned, from the entry and recovery of the same, and continued to be liens against the said premises, until long after the alleged tender of the deed by the said Peter Burk to the said John Huber in the plaintiff's declaration mentioned to have been made on the 1st day of April, 1817; and the said judgments until long after the said tender, remained open and unsatisfied. And this the defendant, is ready to verify; wherefore he prays judgment, if the said Peter Burk, ought to have or maintain his aforesaid action thereof against him."

On the 16th June, 1830, the plaintiff replied specially to this plea, and his replication was demurred to by the defendant

whose demurrer was filed on the 8th of July following. On the 9th of July, the plaintiff joined in demurrer. The argument on this demurrer was commenced the 14th of December, 1831, and continued until the next day, when the plaintiff's counsel moved the court for leave to amend their special replication by substituting in lieu of the same, the following:

"And the said Peter Burk as to the plea of the defendant thirdly above pleaded and by him drawn up at large, of pretended existing judgments and liens, says, that he the said Peter by reason of any thing by the said John Huber in that plea alleged, ought not to be debarred from having and maintaining his said action thereof against him the said John Huber for his damages, &c., (after protesting that the whole matters set forth in the said plea are one and the same with the matters contained in the plea of payment with leave to give the special matters in evidence, and the notice to be given of the special matters to be given in evidence in the cause), because the said John, on the 25th day of March, 1817, called on the scrivener mutually employed by the said Peter and the said John, to prepare the title deed for the conveyance of the said house and lot of ten acres of land, with the appurtenances by the said Peter to the said John and his heirs, in fee simple, clear and free and discharged from all liens and incumbrances, and discharged the said scrivener from proceeding to prepare the said deed of conveyance to him, as he the said John would not accept the same; nor take the said lot of ground, with its appurtenances, so as aforesaid purchased by him of the said Peter Burk, and then and there made no objection to the title of the said Peter Burk of any kind, as to incumbrances or lien by judgment or otherwise being on and incumbering the said premises; from which declarations and conduct, the said Peter Burk did not cause and procure the satisfaction to be entered on the said judgments for whatever sums of money, might be justly due thereon, which he was able and willing to do and perform and would have done and performed, on the 1st day of April, 1817, if the said John Huber had not refused so as aforesaid to comply with his aforesaid purchase, without assigning any cause for his refusal, beyond his intention to violate and withdraw from his said contract; and this the said Peter is ready to verify, wherefore, &c."

This motion, after argument thereon, was allowed, and the amended replication being filed, the defendant's counsel demurred to it as follows:

"And the said John Huber saith, that the said replication of the said Peter Burk last above pleaded, to the third plea of him the said John Huber, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law, for the said Peter Burk to have and maintain his aforesaid action thereof against him the said John Huber, and that he, the said John Huber, is not bound by the law of the land to answer the same, and this the said John Huber is ready to verify; wherefore for want of sufficient replication in this behalf, he, the said John Huber, prays judgment, if the said Peter Burk ought to have or maintain his aforesaid action thereof against him, &c. And the said John Huber, according to the form of the statute in such case made and provided, states and shows to the court here, the following causes of demurrer in law to the said replication; that is to say: 1. The said replication varies and departs from the said declaration, above pleaded, in averring that 'because the said John on the 25th day of March, 1817, called on the scrivener mutually employed by the said Peter and the said John to prepare the title deed for the conveyance of the said house and lot of ten acres of land, with the appurtenances, by the said Peter to the said John and his heirs, in fee simple, clear and free, and discharged from all liens and incumbrances, and discharged the said scrivener from proceeding to prepare the said deed of conveyance to him, as he the said John would not accept of the same, nor take the said lot of ground with its appurtenances so as aforesaid purchased by him of the said Peter Burk, and then and there made no objection to the title of the said Peter Burk of any kind, as to incumbrances or lien by judgments or otherwise, being on and incumbering the said premises; from which declarations and conduct, the said Peter Burk did not cause and procure satisfaction to be entered on the said judgment for whatever sum of money might be justly due thereon, which he was able and willing to do and perform, and would have done and performed on the 1st day of April, 1817, if the said John Huber had not refused so as aforesaid to comply with his aforesaid purchase, without assigning any cause for his refusal

beyond his intention to violate and withdraw from his said contract.' 2. That the *protestando*, embraced in the parenthesis in the said replication of the said Peter, is a departure and variance from the declaration above pleaded by the said Peter. 3. That the said replication of the said Peter, is not certain, direct, and positive. 4. That the said replication pleaded last aforesaid by the said Peter, is neither in substance *or* form any answer in law to the special plea so as aforesaid pleaded by the said John, wherein the said John asserts and affirms that on the 1st day of April, 1817, certain judgments were of record, and liens upon the said land. 5. That the said replication of the said Peter, is double and uncertain; and also, for that the said replication, is in other respects, uncertain, informal, and insufficient."

The plaintiff having joined in this demurrer, the counsel immediately proceeded with the argument. On one side, the court were admonished that they were sitting in this cause as chancellors, as well as judges, whereas, on the other side, it was contended that the questions on the demurrer, are necessarily, sheer questions of law, with which equity has nothing to do. As no inconsiderable portion of the discussion was employed upon these topics, the court will probably be expected to advert to them in their opinion.

Many pleas, it is true, have under our blended jurisdiction of law and equity been expanded, so as to enable the parties to present to the consideration of the court and jury, the facts which constitute an equitable claim or defence; and by this liberal accommodation, the Pennsylvania judicature, is conceived to have attained most of the advantages of a court of chancery, without its cumbrous forms and enormous delay; 1 Dall. 210; 1 Binn. 123; 3 S. & R. 578. The pleas of payment with leave to give the special matters in evidence, performance with leave, &c., both of which are pleaded in this case, enable the defendant to lay before the jury, every fact and circumstance which would, in a court of equity, excuse the want of payment and performance respectively, and discharge him from his engagement. The case of *Jordan v. Cooper*, 3 S. & R. 578, established the doctrine, that as the defendant may plead on principles of equity, the same indulgence ought to be extended to the plaintiff; and that the declaration might be adapted to

the exhibition of a claim founded on equity merely, so as to obtain a recovery of an equitable right. It has been emphatically declared and often repeated, that equity is part of the law of this state; 1 Dall. 210;—and as it can only be administered in our courts of common law and through the medium of legal proceedings, the necessity of expanding or relaxing the common law pleadings of the parties, is exceedingly obvious; since by the strict precedents of special pleading, neither an equitable demand could be detailed in the appropriate averments of a declaration, nor an equitable defence, in those of a plea. But this relaxation consists, in modifying, as I conceive, rather than in essentially changing the forms of the declaration, pleas, &c., and so modifying them, as to allow the party, preserving the beginning, conclusion, and distinctive characteristics of the pleading, to set out the real equity and truth of his case. Had there been in the present action any circumstances in addition to the breach of covenant by the defendant, constituting an equitable right in the plaintiff to recover damages of him, I have no doubt they might have been well stated in his declaration in covenant. Such was, in fact, the point decided in *Jordan v. Cooper*. But the necessity to which I have adverted does not require, that the boundaries of actions, or the essential rules of pleading should be infringed. Even in England, where the court of chancery exerts so commanding a power, it is held that equity does not interfere with the rules of pleading—that a court of equity will not relieve either mispleading, or a neglect, or want of a plea, regarding it as the fault of the party; for in cases proper for the decision of courts of law, it leaves every man to defend himself by legal pleadings; 1 Fonbl. Equity 158. And it is much less to be expected, that our courts, though bound to administer equity, will break down the rules of pleading to protect a party in a similar predicament, from the consequences of his own fault.

Two things, says lord Hobart, are required in pleading: 1. that it be in matter sufficient: 2. that it be deduced and expressed according to the forms of law: and if either be wanting, it is cause of demurrer; *Commendam case*, Hob. 140; *Colt & Crove v. The Bishop of Coventry and Litchfield*. The omission of such material things as are necessary to show a right in the plaintiff, or are material for the defendant in his plea, may

be taken advantage of, on a general demurrer; but matters of form must be specially alleged and assigned as causes of demurrer. In considering the objections to this replication under the demurrer, which is in its form both general and special, we will, in pursuance of the distinction just quoted, *first*, inquire into the sufficiency of the matter demurred to, and, *then*, into the manner in which it is deduced.

The replication avers that the plaintiff was able and willing to satisfy the several judgments set forth in the plea, and would have satisfied them on the 1st day of April, 1817, if the defendant had not, on the 25th day of March preceding, discharged the scrivener who had been mutually employed by the parties to prepare the title deed for the conveyance of the premises, he the defendant making no objection to the title, but merely declaring that he would not accept the deed, nor take the premises. It is to be remembered, that this is not an action for the recovery of the purchase money: if it were, the case of *Huber v. Burk*, 11 S. & R. would be, as it is contended it is, conclusive of the controversy. The supreme court, in that case, after considering several other objections to the judgment which was rendered in the court below, in favour of the present plaintiff, proceeded to remark, "that there is another objection, which would be decisive: the vendor after the time, when he was to have made the title, mortgaged the premises for a sum of money. By thus treating the property as his own, he acquiesced in the determination of the vendee to rescind the contract so far as to preclude him from demanding the specific execution of it, and elected to rest the covenant on the penalty for damages." Notwithstanding their decision, however, they expressly recognised his contingent right to recover damages. "Whether he may not still be able," say the court, "to recover damages in this suit for the loss of the bargain, will depend on the case, he may be able to lay before a jury." But that suit was abandoned. It was an action of debt, for the penalty; and according to the English authorities, where such an action is brought, the plaintiff is not entitled to recover, unless he has punctually and literally fulfilled his part of the contract; Sugd. on Vendors 163. It was, probably, for this reason, that Peter Burk instituted the action of covenant, "which," says the present ch. justice, "is essentially an action to recover damages,

for having disaffirmed the contract; 11 S. & R. 244. If, then, the sole question here, were whether the matter of the replication is, or is not a sufficient answer to the plea of incumbrances, I should decide it in favour of the plaintiff; for it would be clearly unreasonable, that the defendant should be screened from paying a compensation in damages for the injury sustained by the plaintiff in the loss of his bargain, on the ground that the latter had not discharged the liens, when the defendant himself, was the sole cause of that omission, and when to have done it, would have been an idle ceremony in relation to the defendant's performance. The case of *Hampton v. Sprecknagle*, 9. S. & R. 212, is an authority to this point; and there are several cases, to the same purpose, in the English reports. See particularly, *Jones v. Barkley*, Douglass 684; *Martin v. Smith*, 6 East's R. 555. See also 1 Term R. 643, *Hotham v. The E. I. Company*; Roll's Abr. 445; 1 East 619, *Heard v. Wadhani*. This view of the case assumes the facts stated in the replication to be well pleaded—in other words—that the matter is deduced and expressed according to law; the effect of which, would be that, by the demurrer, all the facts stated therein, would stand confessed. But if the replication is vicious—if it is in substance, or even in form, insufficient, then the demurrer does not admit any of the facts which it alleges. In considering farther the objections assigned to this replication, the 3d, 5th, and last, may be disposed of at once. All authorities agree, that the causes assigned must not be involved in general expressions, such as "uncertain,"—"want of form,"—"insufficient," &c., but the party demurring, must specially show how the pleading is defective, the statute intending to oblige him, to lay his finger on the very point; Hob. 232; 5 Com. Dig. 489; (q. 9.) 5 Bac. Abr. 464. These three causes of demurrer, must, therefore, for want of due specification, be overruled.

The first cause assigned as an objection to the replication, is that it varies and departs from the declaration; a fault which has been held by the best authorities to be a defect of substance; 2 Saund. 84 (n. 1.); 20 Johns. R. 153, *Andross v. Waring*. Departure in pleading, is when the second plea contains matter not pursuant to the former, and which does not fortify it; and occurs, when in any pleading, the party deserts the ground he took in his last antecedent pleading, and resorts to another; 5

Com. D. 433, Pleader (F. 7.); 5 Bac. Abr. 449; Steph. on Pl. 405; 2 Wils. 96. It is quite evident that if this were allowable, there would be no end to the pleadings; as the attainment of an issue would often be a legal impossibility. To restrain the parties from abandoning the grounds they have once respectively assumed, is therefore essential to the very purpose of pleading; which is to develop the question in dispute. By taking a new and distinct ground, in any part of the series, a new state of facts is introduced and the result is consequently postponed; besides, upon the same principle, the parties might shift their ground as often as they pleased, producing the consequence already mentioned of an indefinite length of altercation. The declaration here alleges an agreement, on the part of the plaintiff, to give to the defendant, his heirs, &c., for the consideration therein mentioned, a good title on the 1st day of April, 1817, for ten acres of land in the town of Millersburg, whereon is a public tavern, &c., and then avers, 1st, that he always kept and performed his agreement; 2dly, that he on the 1st of April, 1817, tendered to the defendant, a good title for the premises. The first averment, is equivalent to saying that the plaintiff did give the defendant a good title on the 1st of April, 1817, for that was the agreement on his part; the second, that he offered to give him a good title on that day. Passing over the inconsistency of these averments, let us compare them distinctly with the replication, premising that a covenant to convey a good title, means the legal estate in fee, free from all valid claims, liens, or incumbrances whatever; 10 Johns. R. 266.

The ground taken by the plaintiff in his declaration, according to the first averment, is, that he gave, on the 1st day of April, 1817, to John Huber, his heirs, executors, administrators and assigns, a good title, *i. e.* a conveyance of the legal estate in fee, free from all valid claims, liens, or incumbrances whatever in the ten acres of land in the town of Millersburg, &c., with peaceable possession, &c. Whereas in his replication, he admits that he did not make such a title, and that the estate which he had on the day mentioned to convey in the premises, was not free from valid liens and incumbrances; and admitting this, he assumes a new ground, that is to say, the defendant discharged the scrivener, who was employed by the parties to prepare the title deed, without objecting to the title on account of the incum-

branches, or specifying any other ground of objection; and the plaintiff, for that reason did not, on the 1st day of April, 1817, cause and procure satisfaction to be entered on the judgments, with which the premises were incumbered; which is tantamount to the allegation, that, for a good and sufficient cause, he did not give the defendant, his heirs, &c., a good title in the premises, with peaceable possession, &c., as in his first averment above mentioned, he alleged that he had done. Therefore, the replication neither is pursuant to the narr. nor fortifies it; but being repugnant thereto, it falls precisely within the definition of a departure.

Again, take the averment of the declaration to be, that the plaintiff tendered a good title, on the 1st day of April, 1817, to the defendant, his heirs, &c., in the premises, *i. e.* a conveyance of the legal estate in fee, free from all valid liens and incumbrances whatever, the replication is no less variant from this: for the replication, admitting as before mentioned, that the plaintiff's estate was not on the 1st day of April, 1817, free from valid liens and incumbrances, avers that he would have rendered it free from such liens and incumbrances on that day, if the defendant had not discharged the scrivener, mutually employed to prepare the title deed, without objecting to the incumbrances, or making any other specific objection to the title; which is equivalent to an allegation, that the plaintiff did not on the 1st day of April, 1817, tender a good title to the defendant, his heirs, &c., for, and possession of the ten acres of land, &c., as by the second averment referred to, he declares he did.

The result therefore is the same, whether we consider the ground assumed in the declaration to be performance, or tender; or both, if both were compatible.¹ The replication takes new and different ground; it departs from the declaration; and the *first* cause assigned in the demurrer, is sustained; 5 Com. D. 433, Pleader (F. 7). •

The second is, that the *protestando* in the replication, is a departure and variance from the declaration. The *protestando*, regularly, is an allegation collateral or incidental to the main

¹ If the defendant in covenant pleads performance generally, and the plaintiff assigns a breach in the not doing of such an act, and the defendant rejoins, that he offered to do it; this is a departure, for offer and refusal is not the same as performance; Co. Litt. 304, a.; Cro. Car. 76, 77.

pleading, importing that some traversable fact alleged on the other side is untrue; and it has the effect of enabling the party to dispute, in another action, the fact so passed over; which otherwise, he would not be able to do; because the pleading having passed over the fact, would, in the subsequent action, be taken to have admitted it, the rule being that every pleading, is taken to confess such traversable matters alleged on the other side, as it does not traverse. But an answer in *fact*, is no admission of the sufficiency in *point of law* of the matter answered; and it follows, that it is not necessary in passing over an insufficient pleading, without demurrer, and answering in point of fact, to make any protestation. In practice, however, it is not unusual (says Stephen on Pleading) to make a protestation of insufficiency in law, the form having apparently been adopted by analogy to the proper kind of *protestando*, viz. that against the truth of the fact. The protestation here objected to, is not against any fact alleged in the plea; but against the sufficiency of the plea itself, because the matters contained therein, were identical with those of which notice had been given by the defendant, under his plea of payment with leave to give the special matters in evidence. But if the plea were bad, on this or any other legal ground, the plaintiff without the *protestando*, would have the benefit of the objection on the demurrer, which brings the whole record before the court; and, on which, the court must look to the first defective pleading and decide accordingly. The protestation, therefore, is, with reference to the legality of the plea, entirely superfluous. Moreover, every protestation, however regular, is without avail in the suit in which it occurs; every traversable fact, not traversed, is notwithstanding the protestation, to be considered as admitted in *that* suit. For this reason it has been held, that an idle or vicious protestation, does not vitiate the plea, though it be shown for cause of demurrer; 5 Com. D. 471, Protestation N. The second cause of demurrer, is consequently untenable.

It is an established rule that, when demurrer is joined, the court shall adjudge upon the whole record, and not upon the point alone, which is referred to them by the demurrer; and judgment will, therefore, be given against the party, whose pleading was first defective in substance; 5 Bac. Abr. 460; Hob. 56; 5 Com. D. 487; 484 Pleader (q. 5); Chitty's Pl. 647; 1

Saund. 285 (n. 5). So that notwithstanding the defect of the replication, in the present instance, the judgment would still be for the plaintiff, if it appeared that the defendant's plea was bad; unless indeed the declaration were substantially defective:—and this, it is apprehended, is the case; Steph. on Pl. 162, 164, 165. But before I proceed to point out the circumstance, in which this defect is considered to exist, it will be proper to say, that I think the special plea of the defendant, is unobjectionable. It is not shown or averred in this declaration, that the plaintiff, Peter Burk, was seised in fee, or was the owner of the premises which he covenanted to convey, or that he had a good title to convey; Sugd. on Vendors 166, 167. There is no averment of title in the plaintiff. In 5 Comyn's D. 486, Pleader 3 M. 9, it is laid down, that if a declaration does not show a sufficient right or title in the plaintiff, it will be bad on a general demurrer; for a right which does not plainly appear, is as none. See also 5 Com. D. 344 (C. 34), 345 (C. 35), 405 (E. 22); 6 East 555; 3 East 410; 2 H. Bl. 123; 1 H. Bl. 270; 2 Wentw. 91. Chitty, in his 2 vol. of Pleadings 129, after citing several authorities for precedents of declarations by a vendor against a vendee, for not completing his purchase, adds, that "from these it appears, that the plaintiff must show that he had a good title to convey;" see 1 Chitty Pl. 347; 2 Phill. Ev. 64. I have examined all the precedents referred to; and I find, that in every one, the declaration contains an averment of title, except the case of Phillips v. Fielding in 2 H. Bl. 123, in which the declaration was held to be clearly bad for the omission. It is an essential principle in pleading any right or authority, as set up in respect to property, personal or real, that some title to that property be alleged in the party, or some other person from whom he derives his authority; Steph. on Pl. 321; 1 Ch. Pl. 347; Douglass 620, Luxton v. Robinson; Saund. Pl. & Evid. 901. In Beaumont v. Dean, 2 Leon. 10, where in dower, the defendant pleaded that before the writ brought, he assigned a rent of ten pounds per annum to the demandant in recompense of her dower, the demandant thereupon demurred; because the defendant had not shown what estate he had in the lands at the time of the rent granted—as to say that he was seised in fee and granted the said rent; so that it might appear to the court, upon the plea, that the tenant had a lawful power to grant such

rent; which was conceded by the whole court, and the demurrer allowed. This case is important, since it indicates with great clearness the foundation of the rule requiring the party to show in his pleading his title or authority, namely, that it may appear to the court to whose judgment he appeals, that he has a good title or lawful authority. Hob. 223, is equally explicit and strong to this effect. It is not enough, says he, that the party hath right, but such right must be disclosed to the judges upon the record, to enable them to pronounce upon it. Until recently, indeed, the vendor in order to sustain an action for breach of contract, was obliged to display his whole title on the record, it not being sufficient to aver, that he has always been ready and willing, and frequently offered to make a title to the estate; but in a case decided in 1805 (*Martin v. Smith*, 6 East 555), where the vendor averred, that "he was seised in fee," and was ready and willing, and offered to convey to the defendant, this was held sufficient.

The contract in the present case, was to give the defendant a good title to the premises, an estate in fee simple; and it is manifest, that unless the vendor was seised in fee of the premises, he could not maintain an action against the vendee, for the non-payment of the purchase money; Sugd. on Vend. 178, 179. It was, therefore, essential to aver in this declaration, that the plaintiff was seised of an estate in fee, without which his right of action does not and cannot appear to the court. I have felt bound to notice this substantial defect in the declaration (though without this, the judgment be for the defendant on the first objection to the replication), because it is unavoidably presented by the record to the consideration of the court, and being the first defective pleading, the objection arising from it, is paramount.

Judgment on the demurrer for the defendant.

The foregoing judgment was entered by order of the court, on the 6th of February, 1832. Two days afterwards, the plaintiff's counsel moved to amend his declaration in certain particulars set forth in their written application. This motion was placed on the argument list, and was argued by the same counsel who argued the demurrer, at the following June term. The

court, after advisement, disallowed the motion, for the reasons contained in the following opinion by HAYES J.:

This is a motion, on behalf of the plaintiff, to amend his declaration. The action was commenced in 1824, the suit being No. 10 of the September term in that year. On the 18th of December ensuing, the declaration was filed. 1825, June 17, the defendant pleaded payment with leave, &c., and performance with leave, &c. The plaintiff replied, *non solvit*, and that the defendant had not performed his covenants. 1830, June 14, the defendant filed, by leave of the court, an additional special plea, to which, June 16, the plaintiff replied specially. The defendant on the 8th of July demurred to this special replication, and on the 9th of July, the plaintiff joined in the demurrer. 1831, December 14, this demurrer was called up for argument, and the counsel proceeded to argue the same; but whilst the argument was in progress, the plaintiff by leave of the court, amended his replication, his motion for that purpose being opposed by the defendant. To the amended replication, the defendant demurred; and the plaintiff having joined in the demurrer, the counsel proceeded in the argument, which was concluded on the 19th of December. The court, having held the matter under advisement until the 6th February, 1832, delivered their opinion, and directed judgment to be entered on this demurrer for the defendant, who was the demurrant.

On the 8th of February, the plaintiff's counsel presented the following motion, viz. Peter Burk v. John Huber's administrators: In the district court for the city and county of Lancaster: February 6, 1832, the court having given their decision on the demurrer joined in this case in favour of the defendant, motion on behalf of the plaintiff for leave, on payment of costs, to add another count to his declaration, stating the seisin in fee of the plaintiff in the premises contained in the articles of sale declared on, with averments adapted to place on the said declaration, an offer and tender to the defendant, before and on the 1st of April next ensuing the date of the said articles, of a deed in fee simple, and an offer to the said defendant to retain in his own hands or apply so much of the purchase money, payable on that day by the defendant, to the discharge of any and all the incumbrances and liens whatsoever, that incumbered the said house and lot with the appurtenances contained in the said articles except

such as the articles stipulated should remain on the premises by the terms of the articles, and with an averment that the said sale was made by the plaintiff, to enable him to pay off and discharge the said incumbrances and to estate and assure the lands and tenements to the said defendant in absolute fee simple: and also to include an averment, that after the said sale and before the said 1st day of April last mentioned, plaintiff and defendant appointed a scrivener to prepare a title to be executed by the plaintiff to the defendant; and that afterwards the defendant ordered the said scrivener not to proceed to prepare the said deed; that he would not take the said deed, or take the said house and lot; with leave to the defendant to plead anew; and that all the pleadings and proceedings be reformed accordingly. This motion was objected to by the defendant, and being reduced to writing, as above, and filed, was set down for argument. It was argued on the 11th of June.

The decision depends on the following questions: 1. Is the amendment warranted by the common law, or by the English statutes of amendment and jeofails? 2. Is it authorized by the act of the 21st March, 1806? 1. The proposed amendment is one of substance and not of form. Matters of substance, are such as may be taken advantage of on a general demurrer, as the omission of such material things as are necessary to show a right in the plaintiff. And every thing shall be said to be *form*, without which the right of action appears to the court; 10 Co. 88; 5 Bac. Abr. 463; Hob. 301.

The first part of the proposed amendment, is an allegation of seisin in fee of the plaintiff, which, it has already been decided, was essential to the maintenance of his action, and without which, his right of action did not and could not appear to the court. By the common law, courts will allow of amendments while the proceedings remain in paper, or *in fieri*, which by the liberality of modern practice, is understood to be at any time, while the suit is depending, notwithstanding the record is made up; for they at present consider the proceedings as *in fieri* till judgment is given, and therefore, that till then, they have the power to permit amendments by the common law, whether in matter of form or substance. This is the general rule. With respect to demurrers, it is stated to be usual, after demurrer general or special, to give the party leave to amend; and it has

been given even after demurrer argued, but before judgment, when the justice of the case required it, and there was any thing to amend by, upon payment of costs; and lord Mansfield is reported in *Steel v. Lowerby*, to have said, that he recollected the case of the Dutchess of Portland, in which the court gave leave to amend after three solemn arguments on demurrer; 3 Bl. Com. 407; 2 Burr. 756; 1 Tidd 656; 1 Burr. 316, 321; 2 Sell. 454; 6 Durnf. & E. 173. There are several cases, too, in which leave has been given, not only after demurrer argued, but after the court had expressed their opinion in favour of the demurrer; 2 Saund. 402, *Pearce v. Bridges*; Dougl. 328, *Pollybank v. Hawkins*; Dougl. 620; 2 Caines 233. But in some late English cases (1 East 391; 2 Bosanq. & Puller 482; 3 Bosanq. & P. 11, 12), an amendment was denied, after the court had given their opinion on the argument; and in 3 Bosanq. & Puller, where the plaintiff had sued an executor and declared against him on a debt due by the testator, and also on a debt due by the executor himself; demurrer, argument, and opinion of four judges *seriatim*, for the defendant on the demurrer. *Shepherd*, for the plaintiff, then applied for leave to amend. But, by the court; this is not a case, in which we ought to depart from the general rule, that after argument, amendments are not allowed. These authorities may leave the point doubtful, whether or no an amendment is allowable after argument on demurrer, and the opinion of the court thereon announced; but I am inclined to the affirmative.

The application, however, in the case before the court, is not only after argument on demurrer; but it is after one amendment already made by the plaintiff, under leave of the court, on a former demurrer. Now the rule is laid down, with great distinctness, that after a party has once amended on a demurrer, the court will not permit him to amend again on a second demurrer. The rule is so stated in 1 Pennsylvania Practice 149; and I find that the authorities cited, sustain the position. The first is the case of *Kinder v. Paris*, 1 Henry Bl. 561, which was an action by the assignees of an insolvent debtor, who was indorsee of a bill of exchange, against the drawer. The first count states the facts of drawing, acceptance, indorsing, refusal of payment, protest and notice, with liability to the insolvent, his discharge and appointment of assignees, promise to them and

breach. 2d and 3d counts for money paid by the insolvent to the use of the defendant, and for money had and received by him to the use of the insolvent, with promises to the assignees, and breach for non-payment to them. The *plea*, as it originally stood, was *non assumpsit* within six years. *Replication*; defendant was in the West Indies until 11th June, 1792, when he returned to England, and original writ sued out against him, within six years of his return. *Rejoinder*; that the several causes of action accrued to the insolvent, before the plaintiffs became assignees, and six years did elapse from the time they so accrued, before the day of suing out the original writ. To this the plaintiffs demurred specially, that the rejoinder was a departure from the plea; which it was clearly holden to be; and the defendant, had leave to amend. In his amended plea the defendant set forth anew (having withdrawn his first plea), the matters stated in the rejoinder; to which there was now a general demurrer; and this was argued. On the conclusion of the argument, lord chief justice Eyre suggested, that the defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he had made no express promise to the plaintiffs within six years. *Buller j.* seemed to think, the plaintiffs must prove an express promise at the trial. *Le Blanc* (for the defendant) then moved to amend; which, *as the defendant had amended once already*, was refused; and judgment was given for the plaintiffs. In 2 Archbold's Practice of the Court of King's Bench, it is said after a party has once amended on demurrer referring to 2 Henry Bl. 561, the case just detailed, the court of common pleas will not allow him to amend again on a second demurrer; and it is added, the rule is the same in this court. No case which was cited on the argument, or which I have been able to find in my researches since, is opposed to this rule. In the case of *Hallock v. Robinson*, cited from 2 Caines 232, there was but *one* demurrer, and but one amendment allowed on a demurrer. The plaintiff had declared generally for breaking and entering his close in Brookhaven. *Plea: liberum tenementum*, setting out the defendant's freehold by metes and bounds. The plaintiff, without new assigning, replied his own freehold, traversing the freehold of the defendant, concluding with a *hoc paratus*, and praying damages. The defendant demurred specially, among

other causes, for want of a new assignment, and the not concluding to the country: joinder in demurrer. *Kent c.j.*: The replication is evidently no answer, &c. *Woods* for plaintiff then applied for leave to amend, on costs. *Sundford* for the defendant, resisted, as there had been one amendment without costs, and hoped if it were granted, it would be on payment of those formerly incurred. *Kent c.j.*: Amend, on payment of the costs of the demurrer. Judgment for demurrant, with leave to amend. In *Hallet v. Holmes*, 11 Johns. 28, there was a demurrer, which was sustained; and *Spencer c.j.*, after stating that the objection to the plea, namely, that it commenced as an answer to the whole declaration, but answered only a part, was fatal, proceeds to say, that if the plea was good in substance in other respects, and a meritorious plea, the court would ordinarily give the party leave to amend; but it appears, that contingent damages have been assessed on the general issue, upon an inquest at the last Rensselaer circuit; and quoting the case of *Robinson v. Bayley*, 1 Burr. 321, he cites the opinion of lord Mansfield and Mr. justice Denison, that where a demurrer is first argued, the court will give leave to amend; but there never was an instance of amending an issue at law after a verdict had been found upon issues in fact, and contingent damages assessed on the demurrers. In this case of *Hallet v. Holmes*, it does not appear, that there was any amendment before the argument; and what makes the part of *c.j. Spencer's* opinion, which I have quoted, purely *gratis dictum*, is that there was at that time no application before the court, to amend the faulty plea. The case decides nothing except the demurrer. But even the *dictum* and the English authority on which it rests, do not conflict with the rule, that after a party has once amended on a demurrer, the court will not permit him to amend again on a second demurrer—a rule, which is founded upon the necessity of bringing causes to an end; for it is obvious, this never could be done, if the parties might go on demurring and amending without restriction.

The present application is liable to the farther and stronger objection, that it not only asks leave to amend after demurrer (the party having once amended before, on a former demurrer), but the motion is made after the second demurrer was argued, held under consideration, and judgment entered upon it. This goes beyond all the precedents. I cannot find an instance of such an application in the books. This judgment, is *nil capiat*

per breve, and is as conclusive and binding, as if it had been after a verdict; 5 Bac. Abr. 560; 2 Archb. 37; 1 Saund. 80; 2 Burr. 753. After the defendant plead several pleas to the same or several counts of a declaration, and the plaintiff demur to some of the pleas and take issue upon others—if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues of fact, should they be found for him, but the only judgment that shall be entered, is *nil capiat per breve*; 1 Saund. 80, n. 1; Lawe v. King, 2 Saund. 300, n. 3. The proceedings since the judgment was entered, are no longer *in fieri*; and the authority to amend by the common law has ceased.

The syllabus of the case already quoted from 2 Caines, is "amendment allowed on payment of costs after demurrer argued and the judgment of the court pronounced, though an amendment had once before been granted." It has been seen, that this is not a true statement; the application for leave to amend was after argument, and after the chief justice had announced his opinion on the argument upon the demurrer; but it was *before judgment*; which, moreover, was given with express allowance of the amendment. In the report, this sentence immediately follows the discussion of the motion for leave to amend. "*Kent c.j.*: Amend on payment of the costs of the demurrer. Judgment for the demurrant, with leave to amend."

The statutes of amendments and jeofails, were passed to prevent judgments from being arrested or reversed on account of certain omissions or defects of form, or misprisions of clerks in the process or proceedings in a cause. The amendments authorized by statute, were after the record is completed, and are confined to mere mistakes of the clerk or mistakes of the parties, where there is something to amend by; and it is under the authority of these statutes, that all amendments are made of any record, at least after the term to which the record appertains; 2 Sellon 456. But if the plaintiff in his declaration, either state a defective title, or totally omit to state any title, or cause of action whatever, in no case is such declaration aided by these statutes; 2 Archb. 237, 238. The statutes of jeofails, were intended to remedy all defects of *form*. No substance, said Buller j. (Douglass 63), is within any of these statutes.

As the amendment proposed in this case, is matter of sub-

stance—as the declaration altogether omitted to set out or allege any title—no aid, it is clear, can be derived from the English statutes.

II. But is it not authorized by the act of the 21st March, 1806? By the 6th section, it is provided, that in all cases where any suit has been brought, &c., the same shall not be set aside for *informality*, if it appear that the process has been issued in the name of the commonwealth, against the defendant for money owing or due, &c., nor any plaintiff non-suited for *informality* in any statement or declaration filed, &c., but when, in the opinion of the court, such informality will affect the merits of the case in controversy, the plaintiff shall be permitted to amend his declaration or statement, &c., on or before the trial of the cause. This act was only intended to correct matters of form standing in the way of the merits of the case; *Ebersoll v. Krug*, 5 Binn. 53.

In *Grasser v. Eckert*, 1 Binn. 587, the defendants, man and wife, were jointly charged upon an assumption made by them to the plaintiffs. This defect, it was contended, was cured by the act in question. But, said c. j. Tilghman, the great object of this law, was to prevent the merits of the cause from being sacrificed to form. The court are authorized to go great lengths in amendments previous to and even during the trial. But the defect, in the present instance, is a matter of substance. Judgment was therefore arrested. The act of 1806, in short, changes or varies the law on the subject of amendments in no respect, except as to the time, permitting them to be made *on* the trial as well as *before*, and being mandatory to the court with regard to their allowance; but it provides merely, like all the statutes of jeofails, for the amendment of form. The matter of the proposed amendment under consideration, is beyond all doubt matter of substance, and consequently does not fall within the act of the 21st March, 1806.

This amendment then, is warranted neither by the common law, the English statutes, nor our own act of assembly. It is unsupported by the precedents, and is opposed to the policy of the maxim, *interest reipublicæ, ut finis sit litium*. The motion is therefore denied.

The judgment in this case was affirmed by the supreme court.

Mr. W. C. Frazer & Mr. Hopkins, for the plaintiff.

Mr. H. Rogers & Mr. Norris, for the defendant.

IN THE COMMON PLEAS OF BRADFORD COUNTY.

LOVELAND TO THE USE OF SMITH V. DAVIDSON.

1. Where a suit was brought in this state on a judgment obtained before a justice of the peace in the State of New York, it was held that a plea of the statute of limitations in the latter state barring a recovery, was bad. In such cases, as full faith and credit is to be given to the record of the judgment, the *lex fori* and not the *lex loci*, governs.

The present suit was brought to recover the amount of a judgment, originally entered on the 11th March, 1834, before a justice of the peace in the state of New York, in favour of the plaintiff against the defendant. To the narr. filed, the defendant pleaded, admitting the judgment, but specially setting forth in defence a statute of New York, by which it is provided, "that all actions upon judgments rendered in any court, not being a court of record, shall be commenced within six years next after the cause of such action accrued and not after," and farther averring that a justice's court in New York is not a court of record: to this plea the plaintiff demurred, and the defendant joined therein. The present action was commenced October 26, 1842.

Sanderson for the plaintiff.

Williston & Ellwell for the defendant.

CONYNGHAM, president. The court delivered the following opinion.

The judgment before the justice, in the State of New York, is admitted by the pleadings in this case, and is therefore to be considered binding and conclusive between the parties, and as establishing the claim of the plaintiff upon the defendant. It is at this time, too, to receive in the courts of this state, the full faith and credit, to which it would be entitled in New York; *Ellsworth v. Barston*, 7 Watts 314; *Andrews v. Montgomery*, 19 Johns. 162; Const. U. S., sect. 4, art. 3; 3 Story's Com. on Const., ch. 29, p. 1297 to 3107.

The plaintiff has come here to ask the aid of our courts to enable him to recover, from the defendant, the debt thus conclusively established in his favour, by the previous legal proceedings in New York, and not disputed in the pleadings. The de-

fendant, however, alleges that this aid should not be given to the plaintiff, because by a statute of New York, all remedy and process upon such judgment is taken away, and pleads a statute to this effect: the existence of this statute the plaintiff admits.

It is clear from the words of this act, as pleaded, that it is nothing more than an ordinary statute of limitations, operating upon the remedy, and in no other way affecting the validity of the claim: the language of it is similar to that found in the limitation statutes of England and our own and other states, as applicable, however, to claims of a different character.

The defendant does not plead in defence any law of our own state; indeed he could not truly do so, as there is none such to be found among our acts of assembly; he trusts to the effect of the statute of New York alone, in avoidance of the claim. The single question then, presented by the demurrer, is whether this foreign act of limitations is in our courts a good defence? We think not;—the *lex fori* must govern, and not the *lex loci contractus*. This rule of almost universal recognition, will be found fully stated and clearly proven in Sto. Conf. of Laws 483, and *infra*, and a number of cases there cited in the notes. See also 6 Am. Com. Law 514—518. We fulfill our obligation to the constitution of the United States and the act of congress of 1790, when we recognise the full power and effect of this judgment, as conclusively establishing a claim and right of action against the defendant, and thus give effect to the *quasi* record of the justice, as it appears upon its face: we are not bound to look to extraneous matters, which the defendant may or may not, as he pleases, bring forward in defence. The special matter in bar here pleaded, is no part of the record, nor do we in any way impugn the record, by refusing to allow it: it refers to the remedy, and as the pleadings show, has to be specially set forth as a defence against the process awarded by our court, to redress the alleged grievance, and carry this admitted judgment into effect, and therefore not being a defence available under the principles already stated, it cannot be considered sufficient in law, to bar or preclude the plaintiff from having or maintaining his present action.

Judgment on the demurrer for the plaintiff.

IN THE COMMON PLEAS OF LANCASTER COUNTY.

STROHECKER v. HOUSEL.

1. The purpart of a coparcener or tenant in common after partition, is liable to the right, in the other parceners or tenants in common, to recover for the rate; and a purchaser of such purpart in an action on a bond for the purchase money, may set up as a defence a recovery in ejectment against the other parcener or commoners, and is entitled to an equitable deduction from his bond on account thereof.
2. The right to recover for the rate, is not lost by alienation by the parcener or tenant in common of the other purpart; the right of entry is not destroyed by such alienation.
3. A vendee in an action for purchase money, may defend himself on the ground of general failure of title.

Charge of the court.

LEWIS, president. This is a scire facias to recover the balance of purchase money due on a mortgage of 50 acres of land purchased by defendant of plaintiff on the 8th of May, 1823. Under the plea of payment, the defendant gives in evidence that on the 14th June, 1816, the executors of Thomas Grant, under a power in the will, conveyed to John Strohecker and John Garber, 275 acres and 61 perches of land; that in 1819, the said Strohecker and the heirs of Garber, made a parol partition accompanied with possession, by which 150 acres, the south part, was allotted to Strohecker, and 125 acres, the north part, to the heirs of Garber. That on the 29th April, the heirs of Garber conveyed their purpart to George Kremer, and that at January term, 1822, Rebecca Steadman recovered 89 acres or thereabouts, of the purpart of Garber's heirs, by virtue of a title paramount. It is contended by the defendant, that in consequence of this recovery, and by virtue of a condition which the law annexes to a partition, the heirs of Garber, or their alienee, may enter upon the 50 acres conveyed to Housel, which are part of the purpart of Strohecker, and may compel a new partition for the purpose of equalizing the loss; and that the consideration has failed in part by reason of these circumstances.

It is the opinion of the court, that the eviction by Rebecca Steadman, and her recovery of 89 acres or thereabouts from the heirs of Garber, has given those heirs or their alienee, a right to have a new partition of the residue of the land; and so far as

this defendant may lose by that partition, he has a right in this action to a deduction from his bond of such an amount, as upon equitable principles the jury under the circumstances should think just. The correctness of this, if confined to the heirs of Garber, and to a case where there had been no alienation, the plaintiff's counsel do not deny; but they have urged it upon us in this case as well as in the case of Feather and Strohecker, tried during the present term, that the alienation of the whole or a part of the purpart by Garber's heirs, takes away all benefit of the condition and all right of entry for condition broken. Our opinion as delivered in Feather and Strohecker, remains unchanged. If the alienation destroyed this right of entry, we cannot understand the principles upon which the supreme court have affirmed its existence in the case of Feather and Strohecker, where the fact distinctly appeared in that case, as reported in 3 Penn. Rep. 505, that "*after the partition, Garber's heirs sold parts of the land allotted to them to different individuals.*"

In support of the position taken by plaintiff's counsel, Dumper's case in 4 Coke 120 is cited. This was the case of a condition reserved *in the deed of the party*, to enter for non-payment of rent. There is a difference between a condition in *deed* and a condition in *law*, and we readily agree that the former can neither be apportioned or assigned at common law; Coke Lit. 214. In the latter, the assignee may enter for the breach; Coke Lit. 215. Even in conditions in deed in most cases, the assignee may now enter in England by virtue of the statute of 31 H. 8. The reason why a right of entry reserved by deed, was lost by the alienation, was because nothing in action, entry or re-entry, can be assigned or granted over by the common law; and this to avoid maintenance; Coke Lit. 214. The assignee cannot enter, because a right of entry did not pass at common law; the alienor could not enter, because he had by alienation of the principal, parted with all right to the incident; and the right of entry was therefore gone, because it could not be apportioned, any more than a bond or contract could be avoided between parties in interest, so as to enable each to maintain a separate rent in his own name, for the amount of his share. But the condition of entry in the case of an eviction after partition, is a condition which the *law* annexes to the partition. The estate in coparceny is created by the *law*, and not by the *act of the*

parties. As the law created this species of tenancy in common, it also furnished the means of enforcing a partition. And because it would be unjust to compel a parcener to take a particular purpart without also protecting him in its enjoyment to the extent of his original interest, the law annexed the condition, that if the parcener lost the part allotted to him, he should be restored to his original rights, and have a new partition. As this condition was founded upon the partition which the law compelled the party to make, it was a necessary consequence that it did not exist where no writ of partition would lie. Tenants in common were not entitled to a writ of partition at common law, because it was the party's own act in creating such an estate, and the common law would not in that case enforce a division. By the alienation of a coparcener, the estate in coparcenery was turned into a tenancy in common; and as no writ of partition would lie at the suit of a tenant in common, no right of entry to enforce a partition, would exist in the alienee of a coparcener who was by the alienation a tenant in common with the other coparceners. Hence the cases cited from Coke Littleton, in 4 Coke 122, Bustard's case, were sound in principle when Littleton wrote, in whose time no writ of partition would lie for a tenant in common. Sir Edward Coke in his Commentary, does not advert to the then recent change in the law, by which tenants in common and joint tenants, were compellable to make partition. He does not even inform us that such a statute as that of 31 H. 8, cap. 1, had been passed. Authorities from Coke Lit. can therefore furnish but little light in investigating a subject which is entirely unnoticed by him. The moment the law declared that tenants in common should be compelled to make partition, the same principles of natural justice and right reason, which gave the condition of entry on eviction in the case of a coparcener, extended it to the case of a tenant in common. But the existence of this condition, although founded upon common law principles, is expressly recognised by the statute of 31 H. 8, cap. 1, Rob. Dig. 218. That statute declares, that "joint tenants and tenants in common, *may have aid* not only to *deraign the warranty paramount*, but to RECOVER FOR THE RATE, as is used between coparceners after partition by the common law."

The right to recover for the rate had existed for nearly 300

years, when our statute of 1799 was passed giving the supreme court authority to issue writs of partition. It is founded upon natural justice, accords with the principles of the common law, is recognised by a statute which has been considered in force in Pennsylvania, and must have been tacitly acknowledged as the law by the supreme court, when they affirmed the existence of this right in a case where, if the position contended for by plaintiff's counsel be true, it did not exist.

With regard to the other points made, the court are of opinion that as a general rule, a vendee, whether he have general or special covenants in his deed, may defend in an action on his bond for the purchase money, on the ground of failure of title, unless it appears from the whole transaction that he expressly agreed to purchase such title as the vendor had to sell.

If the jury believe that the eviction of Rebecca Steadman, and all the facts connected with it, were known to William Housel before he bought of John Strohecker, and that Housel took the warrantee in his deed for the purpose of protecting himself against any eviction in consequence of the right of entry arising to Garber's heirs by virtue of that eviction, and believe farther, that nothing has occurred since the purchase to render the condition of Housel more perilous than it was before and at the time he purchased, then his defence is not sustained upon equitable principles.

If the jury believe that the defendant with a knowledge of all the facts upon which his defence arises, after suit brought, agreed with the plaintiff's attorney, to waive the defence against the bond and pay the money, provided that plaintiff would give him a bond of indemnity against Garber's heirs, and that in pursuance of this agreement the attorney for the plaintiff sent to Reading to his client, and obtained a bond of indemnity from thence with surety, and tendered the same to Housel, who made no objection to the sufficiency of the surety, but only objected on the ground of a want of money, then it is against equity for the defendant to insist upon that defence which he thus agreed to waive.

IN THE COMMON PLEAS OF PHILADELPHIA.

COMMONWEALTH v. HUBER & CO.

1. The court will, after judgment is obtained against one who has been discharged under the bankrupt law of 1840, set it aside for the purpose of availing himself of such defence, when it is manifest the judgment was entered under circumstances which would induce them to open the judgment when it was clear the defendant had a valid defence in law or equity.
2. The bail of a certificated bankrupt can ask to have an *exoneretur* entered upon the record, on the production of the certificate of the defendant.

PARSONS J.

The questions for adjudication arise on the following facts. An appeal was filed in this writ on the 12th of August, 1839, by the defendants: and on the 16th July, 1845, a narr. was filed by the plaintiff's attorney, and a rule entered to plead in eight days. On the same day, H. Huber by his attorney, pleads *nil dibet*, and his discharge under the bankrupt law of the United States: a mere short plea, without setting forth the record and discharge at length. The attorney states in the plea, that it is filed upon the plaintiff's rule, and that he intends to apply to the court to withdraw his name from the record as counsel for the defendant. At the December term, the cause was on the trial list, and on the 24th January, 1846, when it was reached, the judgment of the magistrate was affirmed under our rule of court, no one appearing to try the cause for the defendant. Henry Huber has filed his affidavit, stating that he had no notice that the cause was at issue, or on the trial list, until after the judgment was obtained, and that he and his surviving partner have both been discharged under the bankrupt law of the United States since the commencement of this action. He now appears by other counsel, and has obtained a rule to show cause why the judgment should not be set aside and the defendants permitted to appear and show their certificates in bankruptcy as a defence to the action. And the same counsel also ask to have an *exoneretur* entered upon the recognizance in discharge of the bail; the principals having obtained their discharge under the bankrupt law.

On these facts two questions arise in relation to the practice which ought to be adopted in this state, under the late act of congress giving discharges to those who were declared bank-

rupts under that law. First, will the court, after judgment is obtained against one who has been thus discharged, set it aside for the purpose of letting him avail himself of such defence, when it is manifest the judgment was entered against him without his knowledge or acquiescence; or under such circumstances as would induce us to open a judgment when it was clear the defendant had a valid defence either at law or in equity, against the whole of the plaintiff's demand. And secondly, whether the bail of a certificated bankrupt can ask to have an *exoneretur* entered upon the record on the production of the certificate of the defendant.

The act of congress under which the defendants obtained their discharge, provides that the certificate shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt proveable under said act: and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself.

The act of congress under which these defendants have obtained their discharge, is of but recent date, and but few cases can be found in this country relative to the points which are now presented for our consideration; hence it becomes necessary to resort to the English authorities under the bankrupt law which prevails in England, to which the late act of congress is analogous; and assimilate our practice as near as practicable to their's.

The rule in England seems to be this, that in a case of fair bankruptcy, the court will set aside a regular judgment to let in the plea of certificate, and the defendant has frequently been allowed to plead it; Eden Bank. L. 426; 1 Tidd Prac. 615; 1 H. Black. 29, *Lewis v. Percy*.

In the case of *Evans v. Gill*, 1 Bos. & Pul. 52, the court granted a rule for setting aside a regular judgment, and it was opposed upon the ground that the defendant wished to set aside the judgment for the purpose of pleading his bankruptcy. But it was remarked by the court, if this was a fair bankruptcy, they would permit the party to make use of it as a defence; when he has given up all his effects, it would be cruel to charge him for a neglect in the attorney. And then observed farther: "In all cases of fair bankruptcy, we think the party should have an

opportunity of taking advantage of it;" and made the rule absolute for opening the judgment; 1 Tidd 233.

These authorities seem to be directly in point; and in England the court would undoubtedly grant these defendants what they now ask. There seems to have been no negligence on their part in suffering this judgment to be obtained. The attorney who originally entered an appearance for them, when he filed the plea, admonished the plaintiff's counsel that he was no longer their attorney: no notice was given to them of the trial, or rule upon them to employ new counsel, and they had no opportunity of presenting their case before the court. Under such circumstances, if the defendants had showed to us a receipt in full from the plaintiff for this demand, no one would pretend but that the judgment ought to be opened and they permitted to present its validity before a jury on a fair trial. If the judgment had been upon a note, and the defendants on this hearing had shown that it was a forgery, or obtained without any consideration, or that the original consideration had failed—there would be no hesitation about setting this judgment aside. Why should there be any now? The act of congress declares that the "certificate shall be a complete discharge of all debts and contracts." They have given up all their goods and effects, and the plaintiff probably proved her debt before the assignee, and is placed upon the footing of other creditors.

And so far did the court carry the rule, that in the case of *Lister v. Mundell*, 2 B. & Pul. 427, that on application they set aside a *fi. fa.*, and ordered the goods and money to be restored when the defendant had been declared a bankrupt subsequent to the judgment. And this upon the ground that the defendant would be driven to his *audita querela*. That an *audita querela* would give the party relief in this case, I think no one who will take the trouble to examine the object of and the use of that writ, can doubt; 3 Black. Com. 406. But under the modern practice in England, the courts rely on motion, in most cases where that writ would be granted; 1 Salk. 93; 1 Bos. & P. 427; 1 Lord Ray. 439; 1 Salk. 264. This writ is rarely issued in Pennsylvania, because the modern English practice has always prevailed here, and the courts rely on motion generally when the defence is legal or equitable; and it is unquestionably the proper course. Now if this discharge is a valid defence at law,

why should not the defendants have the benefit of it if they can render it available? If we set aside this judgment and permit the party to plead in due form his certificate; the whole merits of the case are open on both sides. The plaintiff can show that this is not a debt, or that the discharge is not valid, nor available in a controversy like the present; in short, anything which will destroy the validity of the certificate; Eden 426; Alsop *v.* Price Dorg 160. Surely, then, the defendants ought to be permitted to come in and show their certificate, if it is good.

The next question which arises is this; will the courts discharge the bail on motion, by ordering an *exoneretur* to be entered? I think they will. Such has been the prevailing practice in England for years. Hence we find it laid down as an elementary principle, that a certificate will discharge a *cognovit* given after a secret act of bankruptcy, for a debt previously due, with interest and costs; 1 Todd 230; 2 Taunt. 68.

So also, it is said in the case of Todd *v.* Mansfield, 3 Barn. & Cress. 223: "The general rule is, that where the bankrupt is entitled to his discharge, the court will release the bail."

In the case of Donnelly *v.* Deen, 2 Bos. & Pul. 46, it was held the bail would not plead the discharge of the principal under the bankrupt law, when sued on the bail-bond, because it was his duty to surrender him. But lord Eldon, then chief justice, remarked, they did not mean to preclude an application for *summary relief*.

It has been a long and settled practice in this state, that when the principal would be released from imprisonment, to discharge the bail on motion, by directing an *exoneretur* to be entered upon the record. Therefore, when one has been discharged by the insolvent laws of this state, and his body released from imprisonment, the court have released the bail on motion. Why, then, when the principal is discharged from the debt, of course his body from arrest and imprisonment at the suit of the plaintiff, should the bail be pursued and vexed with costs, trouble or expense of any kind? In this case, I find no reason for it, and none was given on the argument. Therefore, I think the bail should be released. *Let both rules be made absolute.*

[April 4, 1846.

OLIVER v. FOSTER.

1. A plea of *nul tiel record* to a judgment of an alderman, is triable by the record and not by a jury.

The plaintiff brought suit before alderman Hay against N. Salisbury, and on the 7th September, 1841, obtained judgment for \$ 35, from which Salisbury appealed and R. Foster, the present defendant, entered bail in \$ 70, conditioned that Salisbury should prosecute his appeal with effect, &c. Salisbury having neglected to file his appeal in the court of common pleas on the 10th December, 1841, a *scire facias* was issued by the alderman against Foster, and on the return thereof judgment was entered in favour of the plaintiff; from this judgment the defendant appealed.

The plaintiff filed a *narr.* in the court of common pleas, setting forth the recognizance before the alderman, and that Salisbury neglected to file his appeal, whereby it became forfeited. Defendant pleaded (*inter alia*) *nul tiel record*, which plea by direction of plaintiff's counsel, was placed on the argument list, and the court upon the production of a transcript of the alderman's record, gave judgment in favour of the plaintiff upon the plea.

Brightly for defendant, moved to strike off the judgment, for that the plea is not triable by the record, but should have been tried by a jury; and cited 6 Cowen 589; 17 John. R. 272; 5 East 473; 4 Yeates 501; 8 S. & R. 242; Bull. N. P. 230; 1 Troubat & H. Prac. 299; 2 Paine & Duer's T. 189; 3 East 221; 14 S. & R. 440; 4 W. & S. 192; 3 John. R. 429.

Hubbell, contra.

JONES J. The judgment of a justice or alderman, is treated by the supreme court in recent cases as a record. The plea was therefore properly tried by inspection of the record, and the rule must be discharged.

BARR'S REPORTS.

WE have upon our table Barr's State Reports. This is the first volume of Reports published since the act of Assembly of 11th April, 1845, Pamph. L. 374. That act provided that "the governor should appoint and commission a person of known integrity, experience and learning in the law, to be reporter of the decisions of the supreme court of this state;" under this act, Robert M. Barr esq. of Reading was appointed; and we now have the first fruits of his labour. The act farther points out the duty of the Reporter, viz. that he shall "correctly arrange with suitable indices and captions, the material facts and points made in each case endorsed of sufficient importance for publication, and such of the others as he shall deem important for publication." This part of the Reporter's duty, so far as we can judge, has been faithfully and fully executed. The act also provides for the typographical execution of the work. The book is printed by the Messrs. Johnson of this city, and we learn from a card prefixed to the volume, that they have not confined themselves, in the size of the volume to the precise limits of the law (550 pages), "and in the paper, type and general style of execution, they have considerably surpassed the volumes named by the legislature as the standard in these particulars."

The volume embraces the cases adjudged at the May term, 1845, in Harrisburg; the July term, 1845, at Sunbury; and the September term, 1845, at Pittsburg. It is understood the cases of December term, 1845, at Philadelphia, are under the supervision of a gentleman of acknowledged ability, and will be published in the forthcoming volume.

We have some reason to congratulate the profession upon the decreased bulk of our Reports, upon the decreased expense, and upon the better character and style of the general execution of the work.

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NOS. VIII. & IX.

JUNE & JULY, 1846.

VOL. V.

C A S E S OVERRULED, DOUBTED, QUALIFIED, &c. BY THE SUPREME COURT OF PENNSYLVANIA, BY J. F. JOHNSTON.

[The following cases, it is believed, include all that have been overruled, &c., *by name*, in the Supreme Court of Pennsylvania; although it is very probable that in some instances, cases are overruled, &c., in effect, by later decisions; yet when the Supreme Court has not expressly said so, I have not presumed as such to publish them.

For all the cases in the collection overruled, corrected, &c., by courts of equity in England or elsewhere, I am indebted to EDWARD D. INGRAHAM Esq., from whose collection of cases, I was kindly permitted to select such as were most important.

It may not be unnecessary to observe, that reliance should not be placed on the accuracy of the abstracts here given; they are intended only to furnish a speedy reference to the cases themselves, and for this purpose *alone* they have been published.—J. F. J.]

ABELL v. SUTTER, 3 Esp. 108. Questioned, 5 Whart. 539.

ABNEY v. MILLER, 2 Atk. 593.

Lord Thurlow said, the distinction in that case would not do; 11 Ves. jr. 393. Certain words also are probably incorrect. See 16 Ves. jr. 199.

ABRAHAM v. PLESTORO, 3 Wend. 535.

Recognised in Wilbank and Renwick v. Hunt, 23 Wend. 65, 87. Denied in 2 Watts & Serg. 132, and in 5 Watts & Serg. 20.

ABRAHAM v. TWIGG, Cro. Eliz. 478.

That in a devise the words—*of the body*—are necessary to make an

338 *Cases Overruled, Doubted, Qualified, &c.*

estate *tail*. This is contradicted by the whole current of authorities, and see S. C. correctly reported in Moore 424. Per Yeates J., 3 Binn. 386.

ACKER v. WHITE, 25 Wend. 614.

Commented on and explained, 6 Hill (N. Y.) Rep. 558.

AGARD v. KING, Cro. Eliz. 775.

S. P. as Bellasye v. Burbridge, *infra*.

ALDERMAN v. FRENCH, 1 Pick. 1. Questioned 6 Whart. 484.

ALKINS v. BARWICK, 1 Stra. 165; Forts 353; 10 Mod. 431.

Commented on, 2 East 120-2-3.

ALLAM v. HUBER, Stra. 1270; 1 W. Blk. 22.

Part supplied, 5 M. & S. 20.

ALLEN v. YORK. See The King v. Death, *infra*.

ANDERSON'S EXEC. v. LONG, 10 S. & R. 62.

It has been decided that where issue has been joined on the plea of payment, with leave, &c., the jury cannot find any sum due from the plaintiff to the defendant.

Denied in 17 S. & R. 385-6.

ANDERSON v. LEVAN, 1 Watts & Serg. 334.

The principle of it is said by Gibson C. J. to have been doubted by Story J. in United States v. Lyman, 1 Mason 505.

ANDREW v. KOPPENHAAFFER, 3 S. & R. 255.

Corrected 3 Penn. Rep. 67.

ANDREWS v. MOBRAY, 1 Wils. Ch. Rep. 71.

Very well reported, but see 8 Price 164.

ANON. 2 Atk. 14; Green v. Poole, 5 Bro. P. C. 504.

Seems to be the case referred to, Beam. El. Eq. Pl. 155, n. 1.

ANON. 3 Atk. 219, *semble* overruled, 1 Meriv. 303.

ANON. Bunb. 294.

Overruled 2 Ves. & Beam. 333-4, *et seq.*

ANON. 2 Chan. Cas. 19.

Questioned 1 S. & R. 52, 447; 3 Penn. R. 451; 5 Watts 397.

ANON. Gilb. Eng. Rep. 15.

Quere, if not overruled, see 1 Whart. 507.

Cases Overruled, Doubted, Qualified, &c.

ANON. 2 Madd. 263.

Overruled, *semble* 1 S. & Swanst. 469.

ANON. Mosely 268. Overruled 17 Ves. jr. 353.

ANON. 2 Roll. Rep. 124.

That a legacy bequeathed to a *feme covert*, to be paid eighteen months after the death of the devisor; during the eighteen months the wife died—administration granted to the daughter. Montague J.: The legacy did not belong to the daughter, the husband had an interest in it before the time of payment accrued, and could have released it before it was payable.

Denied per Kennedy J., 4 Rawle 183.

ANON. 1 Salk. 154, *semble* overruled, 2 Ves. & Beam. 281–2.

ANON. 3 Salk. 84.

Mr. Evans' note not correct, Coote Morg. 395.

ANON. 1 Vent. 335, reported incorrectly, 3d Phill. Rep. 578.

ANON. 1 Ventr. 268.

Overruled 1 Hen. Blk. 104, Forr. Exch. Rep. 100.

APPLETON v. BOYD, 7 Mass. Rep. 131.

"I confess I am unable to see any established rule of evidence upon which it can be supported." Per Kennedy J., 3 Rawle 451.

ARCAMBALL v. WISEMAN, 3 Dall. 306.

Doubted 2 Mason Rep. 120–22.

ARCHBISHOP OF CANTERBURY v. WILLS, 1 Salk. 315.

Seems to have been overruled in Cowp. 141. See 1 Watts 438.

ARMIGER v. CLARK, Bunb. 111.

As to the remedy of the vendor being exclusively at law—denied 1 Whart. 301. •

ARNOLD v. KEMPSTEAD *et ux.*, Amb. Rep. 466.

Is impugned by the case in 3 Bro. Cha. Ca. 347–51; but see 1 Ves. jr. 520, per Yeates J.; 2 Yeates Rep. 396.

ARRIS AND ARRIS v. STUKELY, 2 Mod. 260–3.

2d point, that *indebitatus assumpsit* will lie for rent received by one who pretends a title, &c. &c., is not warranted by the authority cited from Moore 458, 1 Yeates Rep. 121, and see 10 S. & R. 220.

ASHBY v. WHITE, 1 Bro. Parl. Ca. 49.

Confirmed, and C. J. Holt's opinion explained in 10 S. & R. 40.

ASHURST v. EYRES, 3 Atk. 341.

Very loose report, 7 Johns. Ch. Rep. 215.

ATHERLY ON MARR. SETTLEMENTS.

An able and excellent treatise, 3 Johns. Ch. Rep. 491.

ATKINS v. DAWBURY, Gilb. Eq. Rep. 83.

Not law, 1 Russ. Ch. Rep. 22, 47.

ATKINSON v. HUTCHINSON, 3 P. Wms. 239.

S. P. as in Target v. Gaunt, *infra*.

ATTO. GEN. v. THE GOVERNOR AND COMPANY OF CHELSEA WATER WORKS, Fitzgibbon Rep. 195.

Held, that where the *proviso* of an act of parliament was directly repugnant to the *purview*, the *proviso* should stand, and be a repeal of the purview, &c. Cited as an authority in 5 Rawle 312, but see also 2 Watts & Serg. 36.

ATTO. GEN. v. SHELLY, 1 Salk. 163.

Not to be found in the Register's Book, 11 Ves. jr. 365.

ATTO. GEN. v. PARISH, 1 New Rep. 104.

Not law, 7 Dowl. & Ryl. 378.

ATTO. GEN. v. WYBURG, 1 P. Wms.

The point there reported, it appears from the Register's Book did not arise, 11 Ves. jr. 366, per sir S. Romilly.

ATWOOD v. WELTON, 7 Conn. 75.

That a person who does not believe in a future state of rewards and punishments, is not competent to testify. *Contra*, Cubbison v. M'Creary, 2 Watts & Serg. 262, and held the true rule to be—"whether the witness believes in the existence of a God who will punish him if he swears falsely." Per Sergeant J. ●

AUSTIN'S ADM. v. WHITLOCK, 1 Munf. 487.

Doubted, 2 S. & R. 504.

AVENALL v. CROKER, 1 M. & W. 172.

Overruled by Taylor v. Heniker, 4 P. & D. 242.

AZCARATE v. FITZSIMMONS, 3 Wash. C. C. Rep. 134.

Overruled in part, 8 Watts & Serg. 390.

BACONS' ABR. Vol. 5, p. 15. Incorrect, Coote Mortg. 11, note a.

BACON'S ABR., Vol. 5, p. 76. Incorrect, Coote Mortg. 374.

BACON'S ABR., Vol. 5, tit. Trov. 271 (Lond. ed.)
Not correct, 8 Taunt. 286.

1 BAC. ABR. 369, tit. Bailment (A).

That C. to whom the goods of A. are bailed by B., cannot deliver them to A. the real owner. Denied per Kennedy J., 6 Whart. 421, 443.

6 BAC. ABR. 589, tit. Trespass, citing Brooke, tit. Tresp. 92.

Which says, that when one loans to another cattle to depasture his land, and the loaner takes them within the time, trespass *vi et armis*, will not lie, but case, denied per Rogers J., 3 Watts 259.

BACH v. OWEN, 5 D. & E. 509.

Overruled in part by Bowdell v. Parsons, 10 East 359; Laws on Assumpsit 244.

BACON v. PAIGE, 1 Conn. 404.

Denied in Okie v. Spencer, 2 Whart. 260.

BADCOCK v. ATKINS, Cro. Eliz. 416.

Overruled, *semble* 9 Pick. Rep. 63.

BALDWIN v. MALO, 3 Austr. 835.

Obscurely expressed, Bea. Co. Ch. 211.

BALL v. DUNSTERVILLE, 4 T. R. 313.

See Skinner v. Dayton, *infra*.

BANTLEON v. SMITH, 2 Binn. 46.

Commented on 3 Watts & Serg. 12., and see 8 Watts & Serg. 381.

BARCLAY v. GOOCH, 2 Esp. Rep. 591. Not law, Petersd. on Bail 23.

BARJEAN v. WALMSLEY, 2 Stra. 1249.

Overruled by M'Kennell v. Robinson, 3 M. & W. 434. See Brown on Act. at Law 508, and see 4 S. & R. 360.

BARNES is I believe good authority for points of practice, though for little beside. Per Gibson C. J., 1 Watts 490.

BARNES v. RACKSTER, 1 Younge & Coll. 401.

The reasoning of the vice chancellor denied, per Kennedy J., 1 Barr 276.

BARROW v. PAXTON, 5 Johns. Rep. 258, is unsound 5 S. & R. 280.

BARRY v. ROBINSON, 1 New. Rep. (4 Bos. & Pull.) 293.

Overruled, *semble* by Children v. Emory, 8 Wheat. 642.

BATCHELOR v. VYSE, 1 M. & Rob. 331.

Overruled by same case, 4 M. & Scott 552.

BATES v. DANDY, 2 Atk. 297.

Facts not accurately set forth in this report, 1 Rus. Ch. Rep. 20.

BAXTER v. THE COMMONWEALTH, 3 Penn. Rep. 259.

Inadvertently said that the title to the soil of a street is in the corporation, &c. Per Gibson, C. J., 6 Whart. 45.

BAYHTON v. WARD, 2 Atk. 172. Incorrectly reported, 2 Vea. 69.

BAYLEY v. GREENLEAF, 7 Wheaton 46.

Denied per Gibson C. J., 3 Whart. 493.

BAYLEY v. POWELL, Prec. Ch. 92.

Quere, as to the order about costs, says Mr. Bea. Co. Ch. 93.

BEACH v. HOTCHKISS, 2 Conn. 425.

That where there are more than two partners, account render will not lie, dissented from by Duncan J., 15 S. & R. 156.

BEACH ET AL v. WALKER, 6 Conn. Rep. 191.

Questioned in 13 Conn. 5, and denied in 6 N. H. Rep. 306.

BEARCROFT v. THE HUND. OF BARNH. AND STONE, cited in 3 Sayre's Rep. 235.

That when the time of bringing a new action has expired, an amendment will be allowed which introduces a new cause of action, denied per Gibson C. J., 6 S. & R. 295. See 4 Yeates 507.

BEEKMAN v. LANSING, 3 Wend. 446.

Commented on and explained, 6 Hill (N. Y.) Rep. 382.

BELLASYSE v. BURBRIDGE, 1 Lutw. 213.

That a lease for a year and so from year to year as long as both parties shall please is a lease for *two years certain*, denied per Kennedy J., 4 Rawle 128, and see Bac. Abr. *Lease* (L) 3, p. 626, (*Houvier's ed.*)

BELL v. CHAPLIN, 1 Hard. 321. S. P. as Dutton v. Poole, *post*.

BELL v. MORRISON, 1 Peters Rep. 351. Denied, 5 Wend. 263.

BELL v. REED AND BEELOR, 4 Binn. 127.

Remarks of Brackenridge J., denied in 2 Watts 118.

BENNETT v. MUSGRAVE, 2 Ves. sr. 51.

Is imperfectly or badly reported, 1 Johns. Ch. Rep. 463; but is authority, *ib.*

BENYON v. COLLINS, 2 Bro. C. C. 323.

Dicta in denied, 1 R. & S. 356 (erroneously stated as 3d Bro.) and in 1 Sch. & Sef. 257.

BERNALES, DE v. WOOD, 3 Camp. Rep. 258.

Corrected by Brief, 8 Taunt. 55.

BERRY v. HEARD, Palm. Rep. 327; W. Jones 235.

Incorrect or imperfect in Palm.; 2 Swanst. 145, n.

BERTIE v. LD. CHESTERFIELD, 9 Mod. 30, 31.

It wants that precision which is requisite, to give a correct view of the subject, &c. Per Rogers J., 3 Rawle 303.

BEVERLY'S CASE, 4 Co. Rep. 123.

That a deed, grant, &c. made by any man *non compos mentis* *avoidable*, but not by himself, because no man of full age shall be allowed to stultify himself.

Contra, 5 Whart. 377, and cases cited, and the party himself may avoid his acts except those of record and contracts for necessities and services rendered, by allegation and proofs of insanity. Per Gibson J. *do.*

BIDGOOD v. WAG, 2 W. Blk. Rep. 1236.

Incorrect, 2 Maul. & Selw. 396.

BINDON v. LD. SUFFOLK, 1 P. Wms. 96.

Is inaccurately stated, 2 Ves. jr. 638.

BIRT v. KERSHAW, 2 East 458. Seems is denied, 9 S. & R. 237.

BISCOE v. CORTWRIGHT, Gilb. Ch. Rep. 121.

Said to agree in substance with the Reg. Book; but the counsel said it had long been overruled, 17 Ves. jr. 91.

BISSELL v. HALL, 11 Johns. Rep. 168.

See *Hubbell v. Coudry*, *post*.

BIXWELL v. CHRISTIE, Cowp. 395.

The opinion of Mansfield questioned, 11 S. & R. 87-8, and 4 Watts & Serg. 24.

BLACK. COM. 2 Vol. 96.

"That a deed without any consideration is as it were of no effect," is inaccurate; Cornish on Uses, p. 63.

2 BLACK. COM. 403.

"If a stream of water is unoccupied, a person may erect a mill thereon, and detain the water, *yet not so as to injure his neighbour's mill, for he has by the first occupancy acquired a property* in the current." Denied per Rogers J., 2 Watts 329.

BLACK. COM.

Not very high authority per Id. Eldon, Edinb. Ann. Register, vol. 10, p. 140; Watk. Con. Intr. xvii. Good remarks upon Sampson's Disc. 7.

BLAKEWAY v. EARL OF STRAFFORD, 2 P. Wms. 373.

Semle overruled 2 Ves. & B. 282-3.

BLANCHARD ON STAT. LIM. 106.

That if a debt become payable after the death of the creditor, the statute does not run till letters of administration are taken out. Doubted per Huston J., 1 Whart. 62, but see Levering v. Rittenhouse, 4 Whart. 130, affirming the text.

BLOIS v. HEREFORD, 2 Vern. 501.

"Strange report" per Aston J., Amb. 693.

BOLLINGER v. ECKERT, 16 S. & R. 422.

Imperfectly reported; part only of Judge Huston's opinion is given. See 2 Whart. 108.

BOLTING v. MARTIN, 1 Camp. 318.

Questioned per Gibson C. J., 7 Watts 124.

BOND v. FARNHAM, 5 Mass. Rep. 170. Approved 1 S. & R. 336-7.

BOTHORNLEY v. LD. FAIRFAX, 1 P. Wms. 334.

Said not to be law, 16 Ves. jr. 395.

BOUDINOT v. BRADFORD, 2 Dallas 268.

That the next of kin are *only* entitled to personal estate in the case of intestacy. Denied per Tilghman C. J., 3 Binn. 561. This report is inaccurate in more respects than one. See 1 Binn. 580-84.

BOURNE v. MASON, 1 Vent. 6. S. P. as Dutton v. Poole, *post*.

BOVARD ET UX. v. WALLACE, &c., 4 S. & R. 499.

I think the decision was right, but the court erred in saying that the same point was decided in *Miller v. Miller*, 3 S. & R. 267. Per Tilghman C. J., 13 S. & R. 329.

BOWHEE v. GRILLS, 1 Dick. 38.

Not to be found, Lib. Reg., Beames Costs in Ch. 85, n.

BOYCE v. BAILIFFE, 1 Camp. 60.

Quere if law? See 3 Watts & Serg. 106.

BRABLE v. HOLYWELL, Cro. Eliz. 250.

Overruled by *Cart v. Thoroughgood*, Laws on Assumpsit 209.

BRADHURST AND FIELD v. THE COLUMBIAN INS. CO., 9

Johns. Rep. 9.

Overruled in *Case v. Richards and Riley*; cited and approved in 2 S. & R. 256-9.

BRADLEY'S LESSEE v. BRADLEY, 4 Dall. 112.

"That case is erroneously reported." Per Yeates J., 4 Binn. 157.

BRADYLL v. BALL, 1 Bro. Ch. Rep. 427.

Commented on and explained, 6 Hill (N. Y.) 558, 5 Whart. 271.

BRANDON v. SANDS, 2 Ves. jr. 514.

Overruled, *semble* 6 Sim. & Ry. 30-1.

BRECKBILL v. TURNPIKE CO. 3 Dall. 496.

That an *implied* assumpsit cannot be maintained against a corporation, denied, and that case said not to have been fully considered. Per Tilghman C. J., 4 S. & R. 16.

BREE v. HOLBECK, Doug. 630.

Approved 1 S. & R. 52. See 20 Johns. Rep. 46.

BRENNAN v. CAMANT, Sayer 224.

Overruled, 5 Maul. & Sel. 185; 2 Gallis. Rep. 488; Yelv. 67 (*Metcalf* ed.); 2 Marsh. 339; 7 Taunt. 14; 4 Barn. & Ald. 50; 8 Taunt. 286.

BRETT v. RIGDEN, Plowd. 344.

Dictum, that if a man devise a certain estate, in which he then has nothing, but afterwards purchase it, &c., it shall pass, &c. Denied 11 Mod. 278, and per Gibson C. J., 4 Rawle 335.

BRISTOW v. POTTS, 11 Ves. jr. 81, n.; doubted 17 do. 203.

BRITTON v. GRADON, 1 Lord Raym. 119.

Dictum of Treby C. J., that a judgment against a corporation, by a wrong name, is *void*, denied, 2 Watts & Serg. 162.

BROAD v. BROAD, 2 Cha. Ca. 161; 1 Eq. Ca. Ab. 222.

A very imperfect note certainly, 16 Ves. 362.

BROADHURST v. COLUMB. INS. CO., 9 Johns. Rep. 9.

Denied 2 S. & R. 229, in 4 Whart. 305.

BRO., tit. Trespass, pl. 256, 329, 359.

That if A. takes the goods of B., and afterwards C. takes them illegally from A., B. cannot maintain trover against C., for that by the first tortious taking, B.'s property was divested, &c., denied, in 6 Whart. 425-43, 1 Sid. 431.

BRO. Summons and Severance, pl. 8.

That there can be no summons and severance in personal actions, except in the case of executors, denied, per Yeates J., 1 S. & R. 496.

BROOKE ABR., tit. Tenant, per copy de court roll, pl. 17.

Says that a lease for a year and so from year to year as long as both parties shall please, is a lease for *years*; which according to Bishop of Bath's Case, 6 Co. 36, would make it at least two years, &c.

Denied per Kennedy J., 4 Rawle 127.

2 BROOKE 279, citing 11 Hen. 4, 23; S. P. 6 Bac. Abr. 589, *ante*.

BROOK'S ABR., tit. "*Joined in Action*," pl. 77.

"Trespases against two; they may join in error, or sever at election:" if it is intended to say that each may prosecute his writ of error separately, it cannot be law, because contradicted by many better authorities. Per Tilghman C. J., 6 S. & R. 321.

BROOKS v. HUBBARD, 3 Conn. 58. See Meason v. Phillips, *post*.

BROOKS v. ROGERS, 1 Hen. Blk. 640.

Questioned if not overruled. See 7 T. R. 568-9, and 2 Whart. 357. See Cruger v. Armstrong, *post*.

BROWN'S APPEAL, 1 Dallas 311.

Although the cases in that book, are generally correctly reported, I am satisfied there are some omissions as to the facts of that case. Per Huston J., 2 Penn. Rep. 421.

BROWN v. BARRY, 3 Dall. Rep. 365. S. P. Read v. Adams, *post*.

BROWN v. CALDWELL, 10 S. & R. 114.

Limited and if not, dissented from. See 1 Whart. 50.

BROWN v. DAVIS, 3 T. R. 80.

Buller's opinion too loose, 8 S. & R. 356.

BROWN v. FURRER, 4 S. & R. 216.

Dictum that an action will not lie against the *person* of the devisee of land, charged with a legacy—without a promise to pay it, denied, 6 Watts 174, see 8 Watts & Serg. 400.

BROWN v. JONES, 1 Atk. 191.

Not correct, see 19 Ves. jr. 357, 363; corrected Coop. Cha. Ca. 210, 19 Ves. 366.

BROWN v. M'CULLOUGH, 2 Taylor's N. C. Rep. 2.

Seems can only be sustained by the statute law of that state. See 4 Watts 282, Thoroughgood's case *post*, and 4 Whart. 341.

BROWN v. METZ, 5 Watts 164. Oppo. Smith v. Webster, 2 Watts 478, and the latter confirmed, 9 Watts 311.

BROWN v. PIDGEON, 2 Camp. 594.

Not law, *semble* 4 Dow. & Ry. 657; 3 B. & C. 143.

BROWN v. SCOTT, 1 Dallas 145.

That the same arbitrators in distinct suits between the same parties, may consolidate them, denied in 3 S. & R. 264.

BROWN v. SUTTER, 1 Dall. 239.

That a judgment will not be opened to let in the plea of stat. lim., would scarce be held so now. Per Gibson C. J., 8 Watts & Serg. 273.

BROWN v. THE UNION INS. CO., 12 Mass. 170.

S. P. as Richardson v. The Marine Ins. Comp., *infra*.

BROWNING v. MORRIS, Cowp. 790.

I am not sure that the position taken in the first part of this case, is supported either by prior or subsequent decisions. Per Huston J., 1 Watts & Serg. 183.

BRUCE v. BRUCE, 5 Taunt. 495. Obscurely reported, 10 Wheat. 352.

BRUCH v. LANTZ, 2 Rawle 392.

Overruled 1 Watts 21; 2 Watts 60. "That the principle of that case was without examination is plain, from the printed report of it." Per Gibson C. J., 6 Watts & Serg. 119.

BRYAN v. HORSEMAN, 4 East 599.

If this case had been *res integra*, the court would have decided differently, 9 S. & R. 131.

BRYAN v. LEWIS, Ry. & M. 386.

Overruled by Hubblewhite v. M'Morine, 5 M. & W. 462.

BUCKERIDGE v. BOLLMAN, 1 T. R. 405.

The principle of it, dissented from in 4 Watts & Serg. 330.

BUCKLEY v. COLES, 5 Taunt. 311.

Not very clearly reported, 2 Bingham 76.

BUCKWALTER v. THE UNITED STATES, 11 S. & R. 193.

Qualified, 5 Rawle 123.

BUFKIN v. EDMUNDS, Cro. Eliz. 537.

Held, (Anderson dissenting) that a previous demand of the arrears of a rent charge must be made, before debt could be sustained. Denied per Kennedy J., 3 Penns. Rep. 464.

BULLER'S NISI PRIUS.

"It is surprising that the acute mind of Mr. Buller did not discover the folly, and that he should have stated it (*Snag v. Gee*, 4 Co. 16) as the law in his *nisi prius*, and no otherwise to be accounted for than that he was a very young man, and the book intended as a convenient one, to carry with him on circuit for his own use. In that view it is a useful book." Per Duncan J., 10 S. & R. 49-50.

BULLER'S NISI PRIUS 68.

Noticing *Westley v. Skinner*, incorrect; *semble* 20 Johns. Rep. 72.

BULL v. PALMER, 2 Lev. 165.

Denied 3 Rawle 377, but see 3 Watts & Sergeant 70-1.

BURCHETT v. DURDANT, 2 Vent. 312.

Overruled by *Broughton v. Langley*, 2 Ld. Raym. 783.

BURD v. SMITH, 4 Dallas 76.

Is of little value as a precedent for any thing, &c., 5 Rawle 225.

BURFORD v. LENTHALL, 2 Atk. 551.

Incorrect, *semble* Beames Costs in Ch. 8.

BURLTON v. HUMPHRIES.

As reported or cited in *Long v. Dennis*, 4 Burr. 2052, incorrect; 19 Ves. 19, 6 c. Amb. 256.

BURNET v. HOLYGROVE.

Imperfectly reported, 1 Eq. Abr. 296; 2 Ves. 72.

BURNET v. LYNCH, 5 B. & C. 589.

Dicta of Best & Bayley jr's., opposed by *Mills v. Harris*, cited in *Comyn, Lnd. & Ten.* p. 272.

BURNETT v. KYNASTON, Prec. in Chan. 118.

Dictum, that if a husband assign a bond of his wife for a *valuable consideration*, it will not bind her if she survives, denied, and the S. C. in 2 Vern. 401, has no such dictum, per Gibson C. J., 4 Rawle 472.

BURN'S JUSTICE 201, 202, 14th ed. (citing Dalton c. 133.)

Denied, see Dalton's Justice, *infra*.

BURR v. VAN BÜSKIRK, 3 Cowen 263.

Commented on and explained, 6 Hill (N. Y.) Rep. 20.

BUSTARD'S CASE as abridged in *Viner. Abr.* 145, pl. 5, is not correct. See 4 Dall. 443.

BUTLER v. VANWYCK, 1 Hill 438.

Commented on, 6 Hill (N. Y.) Rep. 433.

BYNE v. VIVIAN, 5 Ves. jr. 604.

A fact supplied from the Reg. Book, 5 Madd. Rep. 417, n.

CADOGAN. v. OLDIS, 1 Atk. 579.

Corrected by *Richmond v. Cadogan*, cited 17 Ves. jr. 67.

CALBRAITH v. GRACIE, 2 Marsh. 599. Doubted in 4 Binn. 462.

CALHOUN v. DUNNING, 4 Dall. 120.

Questioned, 1 S. & R. 209. See 15 do. 172.

CAMERON v. WURTZ, 4 M'Cord 278.

Dissented from 4 Watts & Serg. 315.

CAMPBELL v. GALBRAITH, 1 Watts 70.

Which is not overruled in 1 Watts 121, oppo. 7 S. & R. 303. Overruled 5 Watts 502.

CAMPBELL v. KENT, 3 Penn. Rep. 72.

That a judgment confessed by an attorney at law, on a warrant from the wife of an absent debtor is *void* as to subsequent judgment creditors, by whom it may be annulled in a *collateral* proceeding, overruled, 5 Watts & Serg. 474, 8 Watts & Serg. 387.

CAMPBELL v. STAKES, 2 Wend. 137., contra 3 Rawle 351.

Denied 6 Watts 10.

CAN v. COUNTESS OF BURLINGTON, 1 P. Wms. 228.

Said not to be law by counsel, 16 Ves jr. 395; see also 2 Ves. jr. 163, note *g*.

CANNEL v. BUCKLE, 2 P. Wms. 242.

As to the point of an infant binding her real estate, by a contract in writing, in expectation of marriage, dissented from, 5 S. & R. 312.

CANTERBURY, ARCHB. OF v. WILLS, 1 Salk. 315.

Overruled by Cowp. 141, 4 Penn. Rep. 438.

CARPENTER v. GRAFF, 5 S. & R. 166.

Dictum of the C. J., that the court might suppress depositions, &c., denied per Ross J., 3 Penn. Rep. 42.

CARTARET v. PASCHALL, 3 P. Wms. 199.

That a parol contract might be good without consideration, denied, per Gibson C. J., 1 Barr 450.

CARTE v. CARTE, 1 Ath. 174; Amb. 3.

See Abery v. Miller, *ante*. What Ld. Hardwicke says in that case, of Abery v. Miller, 2 Atk. 593, is probably incorrect, 16 Ves. jr. 201.

CARTER v. CAMPBELL, Gilmer's Rép. 159.

The principle of it, limited in 2 Watts 321-2.

CARTER v. CARTER, 1 Vern. 259.

Marg. note incorrect, *semble* 3 Moore's Rep. 689, 701.

CARTWRIGHT v. CARTWRIGHT, 1 Philm. Ecc. Rep. 90.

Explained in Chambers v. The Queen's Proctor, 2 Curties Ecc. Rep. 415.

CATER v. PRICE, 1 Doug. 243. See rem. upon, 5 Mov. 495.

CHANDLER v. LOPUS, 2 Croke 2.

Overruled in 13 Mass. Rep. 143; and see Seixas v. Wood, *post*.

CHAPMAN v. FOTHERGILL, 2 Lev. 227.

Questioned, *Laws on Assumpsit* 168.

CHARLES ET AL. v. MARSDEN, 1 Taunt. 224.

Has been directly overruled by lord Ellenborough in 1 Camp. 19; per Huston J., 7 Watts 134.

CHIDLEY v. LEE, Prec. Cha. 228.

Overruled by more recent cases, 18 Ves. jr. 10.

CHILD v. MORLEY, 8 T. Rep. 610.

So far as it decides that the action should be special, overruled by Sutton v. Tatham, 2 P. & D. 308 and 4 Scott 489.

CHITTY.

Is in general deemed a very correct compiler, 1 S. & R. 337, (alluding to Chitty on Bills.)

CHITTY'S CRIM. LAW.

"Excellent treatise," per Gibson C. J., 5 S. & R. 317.

1 CHITTY PL. 37.

That in case of a joint contract, if one of the parties die, his executor, &c. is at law discharged, and the survivor alone can be sued, and if the executor be sued, he may either plead the survivorship in bar, or *give it in evidence under the general issue*;—there is no case to support the position, that such a defence is available under the general issue; per Rogers J., 2 Watts 42.

1 CHITTY PL. 509.

"If a plea begins only as an answer to part and is in truth but an answer to part, the plaintiff cannot *demur*, but must take judgment for the part unanswered, as by *nil dicet*," and 1 Williams Saund. 28, n. 3, *acc.*, denied by Spencer C. J., 20 Johns. Rep. 206, and 2 Wend. 544.

CHRISTMAN v. FLOYD, 9 Wend. 340.

Commented on and explained, 6 Hill (N. Y.) Rep. 20.

CHURCH v. LEAVENWORTH, 4 Day 274.

Said that verdicts are never conclusive unless they are specially pleaded, by Swift C. J., but denied by Rogers J., 17 S. & R. 324, and that rule qualified; and see 4 Rawle 273.

CLARIDGE v. DALTON, 4 Maul. & Sel. 226.

The dictum of Bayley J. that "a party who cannot be prejudiced

by want of notice, shall not be entitled to receive it," is not universally true, per Gibson C. J., 4 Watts & Serg. 380.

CLARK v. HERRING, 5 Binn. 33.

Dictum of Yeates J., that where one is bound in an obligation, and afterwards promises to pay the money, *assumpsit* will be on this "promise," &c., denied, 10 S. & R. 321.

CLARKE v. HOPPE, 3 Taunt. 46. See 3 Barn. & Cres. 224.

CLARKSON v. HANWAY, 2 P. Wms. 203.

That a different consideration than that expressed in the deed, could not be averred and proved, &c., denied per Kennedy J., by whom the authorities upon that subject are thoroughly reviewed in 3 Watts 156; see 7 Watts & Serg. 394.

CLIFFORD'S CASE (Ld.), 18 Ass. (Year Book) 18.

Denied 5 S. & R. 382.

CLOW v. WOODS, 5 S. & R. 278.

It certainly seemed to us in Clow v. Woods, that the inconvenience of removing an article contracted for in the hands of the manufacturer, would so account for the retention of possession for a period sufficient to complete the process, as to rebut the inference of fraud &c.; but on mature reflection I am convinced, that that ground was unnecessarily and improperly conceded; per Gibson C. J., 4 Rawle 266.

COATES v. RAILTON, 6 Barn. & Cres. 422.

Questioned, per Rogers J., 1 Rawle 23.

COCKERILL v. KYNASTON (as reported in 4 T. Rep. 281), denied in 3 Rawle 377; and see 7 T. Rep. 358.

COCKRAN v. WELBYE, 2 Show. 79; Bull. 168; 1 Mod. 245; 2 do. 212.

Is not very intelligible, per Smith J., 2 Yeates 342; see 13 S. & R. 401.

COKE.

Was as great a common lawyer as England ever produced, yet certainly he was not equally profound in his knowledge of *equity* or of the law of nations. * * Yet when he says a matter *has been resolved*, I should think he might be relied on; he was not apt to speak without the book, &c.; per Tilghman C. J., 10 S. & R. 128.

COKE LITT. 171; see Sheph. Touch., *infra*.

COKE LITT. 175.

A dictum of Coke that "the tenant by the curtesy shall have a writ of partition upon the stat. 32 Hen. 8, c. 32, citing Bro. tit. Partition 41," denied arguendo, and doubted by the court, 2 Dallas 259; and partition will *against*, but not *for* the tenant by curtesy, do.

COKER v. FARWELL, 2 P. Wms. 563.

More fully stated, 1 Swanst. 390, n. a.

COLBORNE v. MIXSTONE, 1 Leon. 129.

Misreported, 7 Dowl. & Ryl. 497, *et seq.*

COLE v. BISHOP OF COVENTRY, Hob. 164.

Trespass against A. *only*; the plaintiff declared that the defendant *together* with B. and C. committed the trespass, his writ shall *abate*, because by his own showing, he has falsified his writ, &c., *not law*, for such nonjoinder is not matter of abatement; *a fortiori*, it cannot have that effect when disclosed in the declaration; and even if matter of abatement, it must be *pleaded*, 6 T. R. 766; 1 Saund. 291, a, note 4.

COLES v. BARROW, 4 Taunt. 754.

Is not law, *semble*. Quere if not, 4 B. & A. 225, 3 Barn. & Ald. 228, *et seq.*

COLLAM v. HOCKER, 1 Rawle 108.

Quere if not overruled, 14 S. & R. 206, and by Bowman v. Bittenbender, 4 Watts 290.

COLLET v. COLLET, 2 Dall. 294.

That the right to naturalize was not vested exclusively in the United States, overruled 3 Wash. C. C. Rep. 33; 2 Wheat. Rep. 269 (G. Ov. Cas.)

COLLINS v. GRIFFITH, 2 P. Wms. 313.

Overruled, *semble*, 1 Sim. & St. 248.

COLLINS AND TIMBERLAKE v. THE UNION TRANS. CO.,
10 Watts 384.

In the second sentence of the opinion of the court, the word "*not*," between "*is*" and "*introduced*," should be introduced, &c., 1 Watts & Serg. 226.

COLLOTT v. HAIGH, 3 Campb. 362. Not law, 6 Cow. 492.

COLMAN v. SARRELL, 1 Ves. jr. 50.

Would seem to be overruled as to the point of ordering a deed
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354 *Cases Overruled, Doubted, Qualified, &c.*

forming a cloud upon a title to be delivered up, though void at law, 17 Ves. 112.

COLSTON v. GARDNER, 2 Cha. C. 44.

Imperfectly reported, 1 Ves. 182.

COMMONWEALTH v. BLAINE, 4 Binn. 186.

I have never been satisfied of the propriety of that decision, per Gibson C. J., 3 S. & R. 161.

COMMONWEALTH v. FISHER, 1 Penn. Rep. 462.

Overruled in 2 Watts 191.

COMMONWEALTH v. FOURTEEN HOGS, 10 S. & R. 393.

As to the question of removal &c., by *certiorari* &c., passed *sub silentio* &c.; 2 Rawle 21.

COMMONWEALTH v. MURPHY, 14 Mass. Rep. 387.

That the credit of a female witness may be impeached by evidence of prostitution, questioned if not denied, in 3 Pick. 196; denied in 4 Watts 381.

COMMONWEALTH v. PHILLIPS (Mayor's Court New York, reported by Sampson).

That a catholic priest could not be compelled to disclose matters, committed to him in confession, &c., denied per Gibson C. J., 2 Penn. Rep. 417.

COMMONWEALTH v. TENCH COXE, 4 Dallas 170.

Opinion of Yeates J. 204, that actual settlement and residence, &c., cannot be dispensed with, &c., denied, 1 Watts 81.

COMMONWEALTH v. WOLBERT, 6 Binn. 292.

Dictum of Yeates J., that a surety having no remedy here, by filing a bill in equity to compel the creditor to sue his principal, must *pay the money* and take an assignment, &c., decided otherwise, 8 S. & R. 110; see 1 Watts 147.

COMYN v. BOYER, Cro. Eliz. 485.

As to an act not being void, though forbidden under a penalty, denied, 6 Watts 233.

COMYN'S DIG. tit. Fait. A. 3.

Is not correct &c., 4 Barn. & Ald. 442; is excellent authority, 1 Maul. & S. 363.

CONCANEN v. LETHBRIDGE, *Easter* 32 Geo. 3, 2 H. Blk. 40.

The dictum of Loughborough, that plaintiff may recover against a sheriff for taking insufficient sureties in a replevin bond, *more* than double the value of the goods distrained, overruled in *Evans v. Brander et al.*, 2 H. Blk. 550; see 2 Yeates 414 (note).

CONCH v. ASH, 5 Cowen Rep. 265. Questioned, 4 Rawle 458.

CONWAY'S EXEC. v. ALEXANDER, 7 Cranch 218.

That the mortgagee should have a remedy against the person of the mortgagor, in order to make a mortgage, denied per Kennedy J., 6 Watts 410.

COOK'S ERASMUS' CASE, 28 Eliz.; contra, 6 Binn. 94 and 14 S. & R. 99.

COOK v. WISE, 3 Hen. & Munf. 483.

That in debt for rent interest is not recoverable. It *is in covenant*, 6 Binn. 159; 4 Johns. 183; but it cannot be *distrained* for, 6 Gill & Johnson 383.

COOPER v. CHITTY, 1 Burr. 31. Rem. upon, 8 Pick. 545.

COOPER v. FORBES, 2 Bro. C. C. 38.

Overruled, *semble* Sugd. Pow. 510, (Am. ed.)

COOPER v. SPENCER, 1 Stra. 641.

That a verdict does not cure the want of a similliter, denied, 11 S. & R. 32; Cowp. 407.

COPE v. MARSHALL, 3 Sayer's Rep. 235.

• See *Bearcroft v. The Hund. of Barnh. & Stone*, *ante*.

CORBET v. BARKER, 1 Austr. 138. Not law, *semble* 1 Young 15.

CORDALL'S CASE, Cro. Eliz. 316.

Denied, 3 Saund. Rep. 386, and in Cas. Temp. Hardw. 17.

CORNEY v. DE COSTA, 1 Esp. 302.

Has been overruled in *Nicholson v. Gouthil*, 2 H. Blk. 609 and 11 East 114; per Tilghman C. J., 1 S. & R. 336.

COUNDELL v. JOHN, 2 Salk. 505. Overruled 5 Dowl. & Ryl. 23.

COVENTRY v. WOODHALL, Brownl. 67; Hob. 134; 3 Vin. 19; Apprentice (B). pl. 1.

That the master might carry his apprentice out of the kingdom, pro-

vided he went with him, denied in 6 S. & R. 527, and the case as reported in Hob. recognised.

COWELL v. WATTS, 6 East 405; see Bull v. Palmer, *ante*.

COWPER v. LANGWORTH, Cro. Eliz. 608; Roll. 479; 6 Co. Rep. part 6, p. 45.

That debt lies on a recognizance in chancery, although judgment has been obtained on a sci. fa. which is still in force, denied, 2 Watts & Serg. 223; 3 do. 36.

CRISPE v. PERRITT, Willes Rep. 467.

Doubted 1 Ves. & Beam. 65.

CROKE'S REP.

Furnish precedents for almost any opinion, 1 Wash. Rep. 64.

CROW v. BALLARD, 6 Ves. jr. 628. Questioned, see 3 Binn. 63.

CROWSHEY v. MAULE, 1 Swan. 495.

Denied per Rogers J., 1 Whart. 388.

CRUGER v. ARMSTRONG, 3 Johns. Cas. 5.

That in a suit by the indorsee of a note, &c., v. the maker, the former may give the note in evidence and thereby recover on the money counts, denied per Kennedy J. in 2 Whart. 349, *acc.*, 3 Scott N. R. 444; 9 M. & W. 720; but see 9 N. Hamp. R., and 10 Watts 130.

CUFF v. PENN, 1 M. & S. 21.

Overruled by Stead v. Dawber, 2 P. & D. 447.

CURTIS v. BUZZARD, 15 S. & R. 337.

Dictum that if same person should be summoned as a witness by different parties, in different suits, the costs of his attendance may be apportioned among the parties by whom he was summoned, denied, and said that he may recover full costs from each party; 6 Watts 336.

CURTIS v. GROAT, 6 Johns. 168.

That a judgment in trover, trespass, &c., will not change the property of the goods, till it is satisfied, &c., denied; 4 Rawle 287.

CURTIS v. STRONG, 4 Day 51.

That a person who does not believe in accountability *after* death, is not a competent witness, denied in Cubbison v. M'Creery, 2 Watts &

Serg. 263; and per *Sergeant J.*, the true test of the witness's competency, is whether he believes in the existence of a God who will punish him if he swears falsely.

CURRY v. WALTER, 1 Bos. & P. 525.

Commented on, 1 Maul. & S. 279, and not law (it seems), 3 Barn. & Cres. 583; 5 Dowl. & Ry. 478.

CUTTER v. POWELL, 6 Term Rep. 320.

Quere, if by the maritime law, the contract in that case was not divisible, Brook v. Bym, 2 Story U. S. C. C. Rep. 526.

DALTON'S JUSTICE, C. 133.

Where it is said that upon a traverse, costs and damages are awarded, citing the year book, 14 Hen. 8, 16, denied, and the year book has been searched and does not support the citation, &c.; per Tilghman C. J., 1 S. & R. 485.

DALTON, SHERIFF.

That the return of a writ by sheriff without his name being indorsed on it, is *void*, &c., denied, 2 Whart. 219-20.

DANFORTH v. SCHOHARIE, 12 Johns. Rep. 227.

The question whether *assumpsit* would have lain in that case, was not made by the counsel, and therefore it seems, was not passed on by the court, per Kennedy J., 7 Watts 104.

DAVENPORT v. OLDIS, 1 Atk. 579. Doubted, 2 East 41.

DAVID v. ELLICE, 5 B. & C. 196.

Overruled in 2 C. & M. 626; 2 M. & W. 484, and by cases cited in Brown on Actions at Law 139.

DAVIES v. WELD, 1 Vern. 181; 1 Eq. Ca. Ab. 386.

Doubted, 16 Ves. jr. 302.

DAVIS v. BARR, 9 S. & R. 137.

Some dicta in this case denied, per Huston J., 17 S. & R. 291, and see 1 Penn. Rep. 260.

DAVY v. MILFORD, 15 East 559.

Directly overruled by Biays v. The Chesapeake Ins. Co., 7 Cranch 415, acc.; 9 S. & R. 122.

DAWSON v. CLARKE, 15 Ves. jr. 409.

The ground of that judgment not satisfactory, per ld. Eldon, 18 Ves. 253.

DEACH v. BAMPTON, 4 Ves. jr. 700.

Overruled, 3 Meriv. 673; Roper Bar. & Fem. 87, vol. 1.

DEAN v. PEEL, 4 East 19.

This decision has been justly repudiated, per Gibson C. J., 2 Watts 476.

DE BERNALES v. WOOD, 3 Camp. Rep. 258.

Corrected from the brief, 8 Taunt. 55.

DE BORDT v. ATKINSON, 2 H. Blk. 336.

Has been overruled in *Nicholson v. Gouthit*, 2 H. Blk. 609, and 11 East 114, per Tilghman C. J., 1 S. & R. 336.

DECOUCH v. SAVETIER, 3 Johns. 190.

Is overruled by *Kane v. Bloodgood*, 7 Johns. Cha. Rep. 90; see 1 Watts 514.

DEHUFF v. TURBETT'S EXR., 3 Yeates 158.

Seems to be inaccurately reported in part, see 8 S. & R. 115-16.

DELVER v. HUNTER, Bunb. 57.

Not authority, *semble* Roper B. & Fem. vol. 1, 448.

DENN v. CARTWRIGHT, 4 East 31.

S. P. as *Bellasyse v. Burbridge*, *ante*.

DENNISON, JUSTICE.

"Was a most excellent lawyer," 12 Mos. Rep. 183.

DENNISTHORPE v. PORTER, 1 Eden's Rep. 162; Amb. 600.

Not law, *semble* Coote Mortg. 500.

DENTON v. STEWART, Cox's Eq. Ca.

See what probably gave rise to that decision, which altered the course of proceeding in equity in similar cases, 17 Ves. jr. 278.

DEVONSHIRE'S, DUKE OF, CASE, 4 T. R. 741, n.

Not authority (seems), Sugd. Pow. 506, Am. ed.

DEVONSHIRE'S, EARL OF, CASE, 11 vol. Howell Sta. Trials, col. 1353.

Not law, 3 Barn. & Cres. 585; 5 Dowl. & Ryl. 433.

DEW v. CLARK, 1 Hagg. Ecc. Rep. 311.

The principle of that case explained, in *Chambers v. The Queen's Proctor*, 2 Curties Ecc. Rep. 415.

DICKINSON COLLEGE v. CHURCH, 1 Watts & Serg. 473.

Explained in 6 Watts & Serg. 15.

DICKINSON v. LEGARE, (1st point) 1 Dessaus. 537.

Denied in Robinson v. Crofts, 4 M'Cord 519.

DIETRICH v. DIETRICH, 1 Penn. Rep. 306.

Overruled in 4 Watts 167.

DILLON v. ALVARES, 4 Ves jr. 357.

Semble, questioned partly, Beam. Pl. Eq. 141.

DITCHBURN v. SPRACKLIN, 5 Esp. Rep. 31.

Not law, Holt Shipp. 326.

DIXON'S LESSEE v. MOORHEAD, Addison 216.

Denied, 15 S. & R. 171-2.

DOE DEM KNIGHT v. NEPEAN, 5 Barn. & Ad. 86; 27 Eng. Com. L. Rep. 42.

Opinion of Denman C. J., as to presumption of death being a *natural* one, &c., denied, per Gibson C. J., 4 Whart. 171.

DORSHEIMER v. BUCHER, 7 S. & R. 9.

Is authority, but it is not easy to reconcile it on principle to *Lighty v. Brenner*, 14 S. & R. 127, and *Frantz v. Brown*, 1 Penn. Rep. 257. It was argued and decided on the ground of *set-off*, but if it had been put to the court as an equitable defence, the judgment might have been different, &c.; per curiam, 2 Watts 70.

DOUGLASS' LESSEE v. SANDERSON, 1 Yeates 15.

S. P. as *Hyam v. Edwards*, *post*.

DOWNING v. BALDWIN, 1 S. & R. 298.

Corrected and explained, 1 Whart. 50.

DRURY v. THE EARL OF BUCKINGHAMSHIRE, (usually cited as *Drury v. Drury*) 5 Bro. P. C. 570, (better reported in 2 Eden's Rep. 39.)

Seems to have been misunderstood, particularly in 1 Powell on Contr. 53, per Gibson C. J., 5 S. & R. 311.

DRYBUTTER v. BARTHOLOMEW, 2 P. Wms. 127.

Overruled (seems), Roper. B. & Fem. vol. 1, p. 137.

DUCKHAM v. WALLIS, 5 Esp. Ca. 252.

Denied, per Kennedy J., 3 Rawle 452.

DUKE'S CHA. USES.

A book of the highest authority, per *ld.* Eldon, 1 Swanst. 307.

DUKE OF ST. ALBANS v. SHORE, 1 H. Blk. 275-80.

Doubted, 6 East 555; 8 Taunt. 66.

DUNCH v. KENT, 1 Vern. Rep.; 2 Co. 319.

Not law, *semble* 7 S. & R. 515; the ch. justice referred to the old ed. of Vernon.

DUNN v. THE COMMONWEALTH, 14 S. & R. 433.

The reasons of by brother Duncan, for holding even the office copy of such a bond, inadmissible as statutory evidence, seem to be inconclusive; but we wish not to draw the authority of that case into question, per Gibson C. J., 1 Watts & Serg. 264.

DUNNING v. CAROTHERS, 3 S. & R. 385.

In this case, I was of opinion, that the claim of title made upon the land, might be left to the jury as evidence of a formal entry; an opinion which I unreservedly retract, substituting for it, the opinion expressed by Mr. Justice Washington in 4th Wash. C. C. Rep. 369, per Gibson C. J., 9 Watts 30.

DUREE v. DENNISON, 6 Ves. jr. 385.

Questioned, 1 Swanst. 401, n.

DUTTON v. POOLE, 1 Vent. 318, 332, *affi.* in the Exch. Chamb., Raym. 302.

This decision is so irreconcilable to every principle derived by analogy from other actions founded on contract, that I feel inclined to concur with those who have spoken of it in terms of condemnation, per Gibson C. J., 6 S. & R. 442; but see 6 Watts 183 and 352; 5 Whart. 92, and Hubbert v. Borden, 6 Whart. 93; and 1 Barr 334. *Contra*, see 2 M. & W. 519; 4 do. 337; 10 do. 109, and 12 Lehigh 204.

EARL v. WILSON, 17 Ves. 528. Seems not law, 8 Price 31.

EATON v. JACQUES, Doug. 455. *Impeached*, 3 Moore Rep. 534.

EATON v. SANDFORD, 2 Day 523. Dissented from, 7 S. & R. 212.

EDGAR'S LESSEE v. ROBINSON, 4 Dall. 132.

Questioned, 5 Binn. 270.

EDMONDSON v. BAXTER, 4 Hayw. 112 (Kentucky); see Smith v. Richardson, *post*.

EDMONDSTONE v. THOMPSON, 15 Wend. 554.

Explained, 6 Hill (N. Y.) Rep. 10.

EDMUNDSON v. HARTLEY, 1 Austr. 97. Doubted, Beam. Pl. Eq. 31.

EQ. CA. ABR. 2 Vol.

No great authority, 2 Ves. jr. 578; 3 Ves. 186, 721; 2 Jac. & W. 428.

ERWIN v. HELEN, 13 S. & R. 155.

Certain dicta in it denied, 1 Watts 538.

ERYE v. POPHAM, Lofft. 786. Explained, see 6 Watts 540.

ESHELMAN v. HEOKE, 2 Yeates 509. Corrected in 9 S. & R. 275.

ESPINASSE'S NISI PRIUS, 2 Vol. 580.

Position there remarked on, 8 Pick. 546.

EVANS v. CHARLES, 1 Austr. 128.

Contradicted, *semble* by Bridge v. Abbott, 3 Bro. C. C. 224; 6 Madd. 159; see 3 Sim. 328, and Palm v. Hills, 1 M. & K. 470 (7 Cond: 132).

EVANS v. MARTLETT, 1 Ld. Raym. 271, 12 Mod. 156.

Explained, 6 S. & R. 440, note.

EVANS v. THE COMMONWEALTH, 2 S. & R. 441.

After a certificate granted to a Connecticut claimant, the title of a Pennsylvania claimant who has not received compensation, is assignable by deed &c., denied in 3 Penn. Rep. 518.

EXPARTE ELTON, 3 Ves. jr. 238.

The rule sanctioned by Id. Rosslyn: denied per Tilghman C. J., 5 S. & R. 87.

EXPARTE MARSHALL, 1 Atk. 262.

Seems not to be fully or accurately reported; and quere, if law? 5 Rawle 109.

EXPARTE QUINTEN, 3 Ves. jr. 248.

This case was, as I take it, overruled in Exparte Twogood, 11 Ves. jr. 587; per Gibson J., 5 S. & R. 471.

FAIKNEY v. REYNOUS, 4 Burr. 2069.

Overruled, *semble* 3 Barn. & Ald. 181.

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FALKNER v. RITCHIE, 2 Maul. & S. 290.

Overruled, *semble* 6 Moo. 308.

FARMER v. ARUNDEL, 2 Blk. Rep. 825.

Dictum of C. J. De Gray, that "for money paid by one man to another under a mistake either of fact or of law, or by deceit, an action for money had, &c., will lie," is said to be too broad, 5 Taunt. 147, &c.; and no doubt it is so; per Kennedy J., 3 Penn. Rep. 114.

FARR v. NEWMAN, 4 T. R. 621.

Doubted, 17 Ves. jr. 160; see *ld.* Eldon's remarks, *ib.* 168.

FEATHER'S APPEAL, 1 Penn. R. 332.

Dictum that the statute of limitations does not run against the debts of an insolvent debtor, denied, 5 Rawle 136; 4 Watts 430; 1 Whart. 108.

FEBIGER'S LESSEE v. CRAIGHEAD, 4 Dallas 151.

Imperfectly reported, 3 Rawle 137.

FEGER v. KROH.

It was inadvertently said that the judgment was void, while it was only irregular; per Gibson C. J., 10 Watts 102.

FEISE v. RANDALL, 6 T. R. 146. Overruled, 15 Ves. 58; 4 East 372.

FENNER v. MEARS, 2 Blk. Rep. 1269.

That the assignee of a respondentia bond may recover in indebitatus assumpsit, against the obligor upon a collateral promise in writing indorsed by the latter upon the bond to pay the amount thereof to any obligee, has been questioned by lord Kenyon in *Johnson v. Collins*, 1 East Rep. 104, per Kennedy J., 7 Watts 104; see 12 S. & R. 321, and 5 Wend. 203.

FINCH v. FINCH, 4 Bro. C. C. 38; 1 Ves. jr. 534.

Questioned, 1 Swanst. 401.

FINCH REPORTS, Temp.

Character of the book doubted, 10 Ves. jr. 582.

FITZ. N. B. 138-9, tit. Writ of Detinue M.; see Roll. Abr. 606, *infra*.

FITZ. N. B. 267.

That on a recognizance in chancery, if the recognizer die, and the recognizee take out an execution without a *sci. fa.* by means whereof the heirs or terre tenants are ousted, they shall have an assise of novil

disseisin, &c., because the execution is void; so said in *Howard v. Phillips*, 6 Bridg. Rep. 473; denied per Kennedy J., 4 Watts 282, 374.

FITZGIBBON REP. Not authority, 1 Ves. 10.

FOGLER'S LESSEE v. SIMPSON, cited 1 Yeates Rep. 17.

S. P. Hyam v. Edwards, *ante*.

FOLKER v. WESTERN, 9 Ves. 456.

Denied by Mr. Sugden, 2 Sim. & Stu. 106; but said by V. Chan. to be law, *sub modo*; *ib.* 111.

FOOT v. GAUMER, 12 Wend. 195.

Overruled, 6 Hill (N. Y.) Rep. 389.

FAREBROTHER v. ARSLEY, 1 Camp. R. 343.

Seems overturned in its leading principle by that of *Adamson v. Jarvis*, 4 Bing. R. 66; Story on Agency, sect. 339, and cases cited.

FORESTER v. COTTON, Amb. 388.

I take the principle of this case to have been since overruled, per Gibson C. J., 2 Rawle 174.

FORTH v. CHAPMAN, 1 P. Wms. 667. S. P. as *Target v. Gaunt*, *infra*.

FOSTER v. JACKSON, Hob. 52.

Denied per Tilghman C. J., 3 S. & R. 465.

FOSTER v. SHAW, 7 S. & R. 163.

Denied by Kennedy J., dissenting, 4 Rawle 165; see 1 Binn. 190; 8 Watts 382.

FOTHERINGTON v. GREENWOOD, 1 Stra. 129.

Dictum of lord Holt, that if a witness *thinks* himself interested, he is incompetent, though in truth he have no interest; and so if under an *honorary* obligation to pay costs; denied per Tilghman C. J., 4 S. & R. 226.

FOWLE v. FREEMAN, 9 Ves. 351.

In this case has been followed without much apparent consideration, the inconsiderate dictum of lord Eldon in *Seton v. Slade*, *post*, per Gibson C. J., 1 Watts & Serg. 557.

FOWLER v. BLACKWELL, Comyn Rep. Not law, 6 Price Rep. 197.

FOVID, *Ex parte*, before ld. Hardwicke, 1 Burr. 477.

There is a doubt upon it, 16 Ves. jr. 196.

FOX v. BAKER, 2 Wend. 244.

Disapproved, per Bronson J., 6 Hill (N. Y.) Rep. 223.

FRANCIS v. WYATT, 3 Burr. 1481; W. B. 483.

"The truth is that Francis v. Wyatt would now hardly be acknowledged as authority in Westminster Hall, the decisions since the American Revolution being inconsistent with it; per Gibson C. J., 17 S. & R. 141, and 5 Whart. 16.

FRENCH v. M'ILHENNY, 2 Binn. 13.

The authority of that case is much shaken by the judgment in Clayton v. Clayton, 3 Binn. 476, per Tilghman C. J., 14 S. & R. 90.

FREY v. LEEPER, 2 Dall. 131.

Commented on and explained, 6 Hill (N. Y.) Rep. 558.

FROST ET AL. v. RAYMOND, 2 Caine 188.

That the words, "grant," "enfeoff," do not import a warranty, questioned per Huston J., 16 S. & R. 110, &c.; see 1 S. & R. 50; 2 Binn. 95; 1 Bos. & Pull. 21.

GALE v. WARD, 14 Mass. Rep. 352.

Very questionable, 3 New Hamp. Rep. 506.

GAMBIER'S CASE, 1 Cowp. 180.

Overruled by ——— v. Mathews, 4 T. R. 503.

GAMMON v. STONE, 1 Ves. 339. Questioned in 9 Watts 453-4.

GANER'S CASE, stated 1 Burr. 477.

And the cases that follow (which are to be seen in note (b), 16 Ves. jr. 196), there is doubt upon, 16 Ves. jr. 196-7.

GARDINER v. GRIFFITH, 2 P. Wms. 403.

Overruled, Coote Mortg. 59, note (d).

GARRELS v. ALEXANDER, 4 Esp. Ca. 37.

Doubted 8 Ves. 475-6, 5 Watts 402.

GASS v. STINSON, 3 Sumner Rep. 110.

The opinion of Story J. questioned, per Gibson C. J., 6 Watts & Serg. 11.

GAUSE v. WEILEY, 5 S. & R. 521.

S. P. as Brown v. Furer, *ante*.

GAWEN v. SURBY, 1 Lutw. 5.

Overruled, see 3 Saund. 209, C. n. (1).

GEDDES v. HAWK, 10 S. & R. 33.

That words binding heirs, executors, &c., and "*each*" of them, are held to work a severance, is perhaps unreasonable, though it is now too late to recede, &c., 4 Watts 51, and see 1 Watts 291.

GEER v. PUTNAM, 10 Mass. Rep. 312, 17 do. 258.

A promissory note made on *Sunday* held good on demurrer. Contra, 3 Watts & Serg. 444; 6 Watts 231; 1 Root 174; 6 Bing. 653; 3 M. & W. 240; 6 D. P. C. 355; 1 Horn & Hurlstone 12; 2 Pick. 250. A note will not be presumed to have been made on Sunday, because so *dated*, 1 Cr. & J. 180.

GIBSON v. COLT, 17 Johns. Rep. 390.

Was much shaken if not entirely overruled, by *Sandford v. Handy*, 23 Wend. 260, per Bronson J., 6 Hill (N. Y.) Rep. 336.

GIBSON v. PATTERSON, 1 Atk. 12.

Is not supported by latter decisions, &c., per Gibson C. J., 5 S. & R. 443.

GILMAN v. RIVES, 10 Peters Rep. 299.

Commented on and explained, per chancellor Walworth, 6 Hill (N. Y.) Rep. 135.

GILPIN'S CASE, Cro. Car. 161.

Denied to be law, 1 Salk. 241; see 4 Rawle 44.

GLAZIER v. GLAZIER, 4 Burr. 2512.

"Correctness of report and soundness of doctrine much doubted," 3 Phill. Rep. 554.

GOLDER v. PRINCE, April 1814, C. C. U. S.

The opinion of Washington J. denied, per Tilghman C. J., 3 S. & R. 69.

GOODTITLE on dem. of **RAVELL v. BRAHAM**, 4 T. R. Rep. 49.

That defendant is entitled to the general reply, where plaintiff proves pedigree and stops, and defendant sets up a new case, which is answered by other evidence on the part of the plaintiff—not law in Pennsylvania, 1 Yeates 305.

GORDON'S DIGEST.

For authority of, see 3 Peters Sup. C. C. Rep. 266.

GRANT v. VAUGHAN, 3 Burr. 1516.

See *Cruger v. Armstrong*, *ante*.

GRAY v. PENTLAND, 2 S. & R. 23. Corrected, see 6 Watts 166.

GRAYDON'S PRECEDENTS.

"A work in general of much accuracy," per Duncan J., 10 S. & R. 396—an *exception* in that case.

GREEN v. DEWIT, 1 Root R. 183.

We conceive this decision to be a departure from the principles of the common law, and of no binding authority in this state; per Rogers J., 3 Penn. Rep. 132.

GREENLEAF'S EVIDENCE.

"A book whose accuracy is surpassed only by its usefulness," per Gibson C. J., 8 Watts & Serg. 378. In Vayden v. Hays, April 8, 1846, at *nisi prius*, Burnside J., having cited Greenleaf on Ev. vol. 2, said of its author—"he is in my opinion the best legal writer now living."

GRIFFITH'S LESSEE v. TUNCKHOUSER, 1 Peters C. C. Rep. 421.

I should be disposed to follow it as a precedent, were it not that I am satisfied it is contrary to the practice which has prevailed in our courts, &c., per Tilghman C. J., 14 S. & R. 375.

GRISWOLD v. PENNIMAN, 2 Con. 564.

Questioned per Kennedy J., 4 Rawle 179.

GRISWOLD v. STEWART, 4 Cowen 457.

So far as that case was decided on the ground that the judgment was absolutely *void*, denied, 4 Watts 279, 374.

GUN v. PRYOR, Fon. Eq. Rep. 88, n.; S. C. 2 Dick 657; 1 Cox Eq. Ca. 199; 2 Ves. jr. 456.

Overruled, 3 Bro. C. C. 489; Beam. El. Eq. Pl. 123.

GURLY v. GETTYSBURG BANK, 7 S. & R. 324.

"That the reasonableness of notice to an indorser, of the non-payment of a promissory note, is a question of fact for the jury," overruled in 6 Watts & Serg. 401.

GUTTERIDGE v. SMITH, 2 H. Blk. 377.

S. P. as *Harding v. Spicer*, *infra*.

GWILLIAM v. BARKER, 1 Price Rep. 277.

A dictum of Thompson C. B. commented upon, 2 Brod. & Bing. 366, and 5 Moo. 92.

HALL v. LAWRENCE, 4 T. Rep. 589.

Is not binding upon us as an authority, and upon principle we cannot accede to the decision. Per cur. 4 Dallas 233, 271.

HAMMER v. WILSEY, 17 Wend. 91.

Explained 6 Hill (N. Y.) Rep. 10.

HAMMOND v. DOUGLASS, 5 Ves. 539.

The authority of this case was doubted in *Crawshay v. Collins*, 15 Ves. 218.

HANFORD v. ARTCHER, 4 Hill 271.

Commented on, 6 Hill (N. Y.) Rep. 433.

HARDING v. GLYNN, 1 Atk. 469.

Is not accurate, 16 Ves. jr. 35; 5 Ves. jr. 501; 8 Ves. 571; 19 Ves. 30, 32.

HARDING v. SPICER, 1 Camp. Ca. 327.

That after a plea of tender by defendant and money brought into court, that plaintiff cannot suffer a nonsuit, denied per Kennedy J., 7 Watts 498.

HARRIS v. BELL, 10 S. & R. 43.

The opinion of Duncan J. corrected in 3 Penn. Rep. 228. See 9 Watts 345.

HARRISON v. TEIRNANS, 4 Rand.

The distinction taken by the judge between a bill of exchange and a bond was unnecessary to the decision of the main point. It is in opposition to *Texira v. Evans*, cited in 1 Anstr. 229, and to 6 S. & R. 308, per Rogers J., 17 S. & R. 440; see *Sheph. Touch. post*.

HARRISON v. WILCOX, 2 Johns. 448.

As to a release, &c., denied 1 Rawle 396.

HART v. GREGG, 10 Watts 190.

Corrected in 2 Watts & Serg. 299.

HARTNESS ET AL. v. THOMPSON ET AL., 5 Johns. Rep. 160.

That in an action on a contract against two or more, and one defendant pleads *infancy*, the plaintiff can enter a *nolle prosequi* against him, and proceed against the others; acc. 2 Miles 142, but quere, see 4 Watts 44; 2 Rawle 334; 7 Watts 212; 9 Watts 25.

HARVEY v. ASHLEY, 3 Atk. 615. See *Cannel v. Buckle, ante*.

HARVEY v. SKILLMAN, 22 Wend. 571.

Explained 6 Hill (N. Y.) Rep. 386.

HARVEY v. TURNER, 4 Rawle 228.

Explained, &c., 6 Whart. 23.

HARWOOD v. PHILLIPS, 6 Bridg. Rep. 473.

See Thoroughgood's case, *post*.

HATCH v. DWIGHT, 17 Mass. Rep. 289.

Dictum of Parker C. J. S. P. as in Blk. Com. 403, *ante*.

HAUER'S LESSEE v. SHEATZ, 2 Binn. 532.

Questioned per Yates J., 5 Binn. 259.

HAWES v. SMITH, 2 Lev. 122.

Overruled 1 H. Blk. 104; Forr. Exch. Rep. 100.

HAWK v. GEDDIS, 16 S. & R. 23.

Seems overruled by Geddis v. Hawk, 1 Watts 280.

HAWKINS v. SANDERS, Cowp. 289.

When a man is under a moral obligation which no court can enforce, and promises, the honesty and rectitude of the thing is a good consideration, denied, per Gibson C. J., 1 Barr 451, and the note to Wennall v. Adley, 1 Bos. & Pull., approved.

HAYDOCK v. COBB, 5 Day Ca. 527.

Denied, and the dissenting opinion of Swift J. adopted; 4 Watts 280, and see 374.

HAYNE v. JONES, 3 Taunt. 404.

Marginal abstract incorrect, 8 Taunt. 127.

HEARLE v. GREENBANK, 3 Atk. 717.

Is different from, and it seems not as correct as the report in 2 Ves. sr. 298; 1 Madd. Rep. 962 or 462; see Morgan v. Morgan, *post*.

HEATH v. SANSON, 2 B. & Ad. 291.

Qualified in 1 Mood. & Rob. 366. See 4 Watts & Serg. 447.

HEISTER'S LESSEE v. FORTNER, 2 Binn. 40.

Dicta of Yeates J. dissented from, 1 Rawle 227.

HENCH v. METZER, 6 S. & R. 272.

That trover abates by the death of the defendant. Without ven-

turing to deny the authority of that case, I may be permitted to regret that such is the law of Pennsylvania, and am unwilling to extend the decisions farther than we are bound to do by the principle of *stare decisis*; Rogers J., 16 S. & R. 301.

HENEAGE v. HENEAGE, 4 T. R. 13.

Doubted somewhat, 16 Ves. jr. 509.

HENRY v. RISK, 1 Dallas 265.

That interest is not payable for goods sold and delivered, denied 4 Dallas 286-9.

HEPPARD v. DOUGLASS, Inrgr. on Insol. 208.

Questioned 4 Rawle 458.

HERBERT v. FLOWER ET AL., 2 Barnes 293 (old ed).

That a release cannot be given in evidence under *non assumpsit*, not law; 4 Yeates 350; Burr. 1010; 3 Burr. 1353.

HERRING v. PANCHARD, Cro. Jac. 153.

Overruled in *Freeman v. West*, 2 Wils. 167; see 3 Barn. & Ald. 157-8.

HEYTER (HELLIER) v. JONES, 3 Rep. on Cha. 106; 1 Eq. Ca. Ab. 337.

Very loosely stated, Coote Mortgage 138, n., a.

HILDRETH v. SANDS, 2 Johns. Cha. Rep.

"Doubted by Washington J., in *Bradford v. Geisse*, C. C. Penna., 18th May, 1829. He said, *Sugden V. & P.* 472 contains the doctrine, and the cases of purchasers for valuable consideration without notice. Bill dismissed with *costs*." (Mr. Ingraham's note.)

HILL v. ADAMS, see *Swannock v. Lyford*, *post*.

HILL v. WADE, Cro. Jac. 523.

Denied, per Eyre C. J., 1 Stra. 89, and see *Laws on Plead.* 234.

HILLARY v. WALKER, 12 Ves. 239.

Mr. Sugden and Mr. Pemberton agreed, that it had not met with the approbation of the profession, 2 Sim. & Stu. 162.

HILLS v. ROSS, 3 Dallas 331.

That one partner cannot enter an appearance for another, not the law of the present day, per Duncan J., 12 S. & R. 250.

370 *Cases Overruled, Doubted, Qualified, &c.*

HINCHLIFFE v. HINCHLIFFE, 3 Ves. jr. 516.

Questioned 1 Swanst. 401, n.

HINCHMAN v. GRAHAM, 2 S. & R. 170.

Opinion of Tilghman C. J. corrected in 16 S. & R. 58.

HINE v. ALLELY, 4 Barn. & Adol. 624; S. C. 24 Eng. Com. L. 127; 1 Nev. & Man. 433.

Quere if rightly decided, see 2 Whart. 121.

HINKLEY v. WALTERS, 8 Watts 260; S. C. 9 Watts 183.

Explained 8 Watts & Serg. 318.

HITCHCOCK v. AIKEN, 1 Caine 460.

Overruled 15 Johns. 144; 19 do. 162; 9 S. & R. 260.

HOBART'S REPORTS.

The marginal notes are well known to be *ld.* Hobart's own, per *ld.* Hardwicke, 3 Atk. 695; 1 Ves. sr. 305.

HODGE v. CLARE, 4 Mod. 19.

Is falsely reported, per Tilghman C. J., 3 S. & R. 46.

HODGES v. BEVERLY, Bumb. 81.

May now be considered as entirely overruled, Kennedy J., 4 Rawle 182.

HODSDEN v. LLOYD, 2 Brown Ch. Rep. 534.

Lord Thurlow's opinion disputed in 1 Yeates 229.

HOGAN v. JACKSON, Cowp. 304. Doubted 2 Maul. & S. 558.

HOLWORTHY v. ALLEN, 2 Bro. C. C. 16; 1 Cox 202.

The two reports are entirely different, Beam. Co. Ch. 204.

HONNER v. MORTON, 3 Russel 298. Denied 4 Rawle 471, &c.

HORNE v. LEWIN, 2 Salk. 583, and 3 Salk. 273.

That to an avowry for rent in arrear, a general replication, *de injuria sua propria, absque hoc quod fuit in arretro*, amounted to the *general issue*, and so was ill, explained 5 S. & R. 357.

HORNER v. TWINING, 3 Pick. 492.

"I have examined that case with the attention it merits, and I am compelled to say, I cannot agree to the principle which is there decided," per Rogers J., 3 Rawle 352.

HORNSBY v. LEE, 2 Madd. 16.

Denied by Gibson C. J., in Siter's case, 4 Rawle 471, &c., which see.

HOTHAM v. IND. COMP., Doug. 272.

Certain *dicta* overruled, 7 Taunt. 756; 8 Taunt. 606.

HOTHAM v. STONE, in note to 1 Twin. & Russ. 224.

Questioned per Kennedy J., 1 Barr 515.

HOTLEY v. SCOTT, Lofft. 316.

Report said to be "unintelligible" by Burrough J. (see the case reported *nom.* Lord Tankerville v. Pritchard et al., 2 Brod. & B. 496), 2 Brod. & B. 516-7.

HOVEY v. BLAKEMAN, stated 9 Ves. jr. 524.

Semble, not to be supported, 2 Roper Bar. & Fem. 239, *et seq.*

HOWARD v. DAMIANI, 2 Jac. & Walk. 458.

Heard by consent, and not authority, 1 Russ. Cha. Rep. 47.

HOWELL v. ALKYN, 2 Rawle 282.

The opinion of Huston J. corrected in 4 Rawle 380.

HOWELL v. HANFORTH, 2 W. Blk. 1016.

Has been overruled per Gibson C. J., 1 Watts 62; see 3 Saund. 187, a., n. 2.

HOWER v. THWING, 3 Mass. 494. Denied 6 Watts 12.

HOWIS v. WIGGINS.

Is not fully stated in 4 T. R. 714. The nature of the suit does not appear, &c., per M'Kean C. J., 2 Yeates 16.

HUBBELL v. COUDREY, 5 Johns. Rep. 132.

That a judgment of another state is but a simple contract debt, and that to debt on it the statute of limitations may be pleaded in bar, denied 13 S. & R. 423; 14 Johns. 149.

HUBERT v. GROVES, 1 Esp. Rep. 148.

At variance with Hart v. Basset, T. Jones 156; see 1 Binn. 469; 4 Maul. & S. 103-4; 3 S. & R. 393.

HUBERT v. WILLIAMS, 5 Cowen Rep. 537.

Questioned 4 Rawle 458.

HUBLEY v. KEYSER, 2 Penn. Rep. 496.

Qualified in 9 Watts 323.

HUCKLE v. MONEY, 2 Wils. 205. Explained 10 S. & R. 410.

HUDD v. RAVENOR, 2 B. & B. 36; S. C. 6 Eng. Com. Law Rep. 306.

Opinion of Dallas C. J. questioned, per Kennedy J., in 6 Whart. 464.

HUDDLESTON v. BRISCOE, 11 Ves. 583.

See Fowle v. Freeman, *ante*.

HUDSON v. HUDSON, 1 Atk. 461.

"If an office were granted to two, they must join in executing the acts of the office, &c. This has been repudiated, Jacomb v. Harwood, 2 Ves. 267-8, &c., per Kennedy J., 4 Rawle 156.

HUGGINS v. T. BUILD. CO., 2 Atk. 44; Barn. & Cres. 83.

Diff. stated 16 Vin. Ab. 368; Beam. Co. Cha. 226.

HUMBLE v. BILL.

Reversed in the house of lords, 2 Vern. 244; 11 S. & R. 386; see 17 Ves. jr. 160.

HUME v. SCOTT, 3 Marsh. 361.

See The Commonwealth v. Murphy, *ante*.

HUNT v. ROUSMANIER, 8 Wheat. 174.

The intimation in this case that a mistake in point of law is available as a defence, independent of fraud, &c., is unsupported by authority, per Gibson C. J., 2 Rawle 430; see 3 Watts & Serg. 264; 18 Wend. 319; 20 do. 174; 3d Am. Law Jurist 30, 37; 5th do. 146, art. 10.

HURST v. BROWN, Peak N. P. Ca. 54.

Overruled by Hawkins v. Duperoy, 9 East 489, and Parslow v. Dearlove, 4 Taunt. 200. Per Gibson C. J., 4 Watts & Serg. 203.

HURST'S LESSEE v. KIRKBRIDE, 1 Yeates 139.

Explained, &c., 10 S. & R. 342.

HURD v. WEST, 7 Cowen 752.

That the declarations or admissions of the vendor of personal property, though made before the sale of it, are not evidence against the vendee, denied per Kennedy J., 3 Rawle 450-1.

HUTTON v. BRAGG, 2 Marsh. 339; 7 Taunt. 14.

Limited if not overruled, by *Christin v. Lewis*, 5 Moore 211; see 10 Bingham. 345.

HUTTON v. JYMPSON, 2 Vern. 722; S. C. Gilb. 115.

More fully reported, 19 Ves. 615.

HYAM v. EDWARDS, 1 Dall. 2.

Held that a copy of the register of births and deaths of the people called Quakers, proved to be a true copy, by an *ex parte* affidavit before the lord mayor of London, was good evidence in cases of pedigree, admitted to be law, though its principle was disapproved, and said that such affidavits made in *other states*, not beyond sea, were not admissible, per Tilghman C. J., 10 S. & R. 388.

ILDERTON v. ATKINSON, 7 T. R. 480.

Seems is denied in 9 S. & R. 237.

ILGENFRITZ'S APPEAL.

* Was decided without adverting to the statute of 1833, an oversight for which it is difficult to account, 9 Watts 358.

INGRAHAM ON INSOLVENCY.

That the practice is to refer it to the prothonotary to ascertain whether a majority of creditors have consented in writing to exempt from execution for seven years the property of an insolvent; the practice is unauthorized; see 4 Watts 207.

INMAN v. FOSTER, 8 Wend. 602.

Commented on and disapproved, 6 Hill (N. Y.) Rep. 518.

INNIS v. MILLER, 2 Dall. 50.

Seems to be overruled, see 4 S. & R. 226.

IRVINE v. CAMPBELL, 6 Binn. 118.

Certain dicta questioned in 7 S. & R. 76.

ISAAC v. DE FRIEZ, Amb. 595.

Stated from Lib. Reg., 17 Ves. jr. 373, the report erroneous and imperfect.

ISAAC v. HUMPAGE, 1 Ves. jr. 427; 3 Bro. C. C. 463.

Is of no authority, 1 Swanst. 254, n. b.

ISETT v. BRENIZER, MS. Oct. 1828.

Cited and the reasoning of the C. J. dissented from, per Rogers J., 1 Penn. Rep. 424.

374 *Cases Overruled, Doubtéd, Qualified, &c.*

ISRAEL v. DOUGLASS, 1 H. Blk. 239.

Doubted, 6 Dow. & Ry. 290, *et ante*.

JACKSON v. BRADT, 2 Caine 169.

That *tenant in common* may recover in ejectment on a joint demise, &c., denied, 12 S. & R. 436 (August, 1806).

JACKSON v. THE COMMONWEALTH, 2 Binn. 79.

That a judgment in a criminal case will not be reversed in part. It may deserve farther consideration, whether even in a criminal case, the judgment may not be reversed *as to costs*, and affirmed as to the rest, or *vice versa*; Tilghman C. J., 4 S. & R. 452.

JACKSON v. CUMMINGS, 5 Mees. & Welsb. 342.

That the agistment of cattle gives no lien, questioned per Gibson C. J., in 7 Watts & Serg. 467.

JACKSON v. FAIRBANK, 2 H. Blk. 340.

Overruled, *semble* 6 Johns. Cha. Rep. 291; 5 Conn. Rep. 10.

JACKSON v. HAVENS, 2 Johns. 438.

The doctrine of this case is carried too far; see 5 Johns. 281 and 7 Watts 408.

JACOBS v. MILLER, 3 Watts 447.

Confirmed and explained; S. C. 5 Watts 208.

JACKSON v. Ex dem. PARKER v. PHILLIPS, 9 Cowen 94.

So far as it holds that one who affixes his name to an instrument after its execution, without being requested, is a good subscribing witness, disapproved; per Bronson J., 6 Hill (N. Y.) Rep. 303.

JACKSON v. PURDUE, 3 Penn. Rep. 523.

That the act of assembly in reference to taking illegal fees &c., is a *remedial act* &c., denied per Rogers J., 8 Watts & Serg. 165.

JACKSON v. STILER or STETSON et ux., 15 Mass. 48.

Questioned, 6 Whart. 434.

JACKSON v. TUTTLE, 18 Johns. Rep. 98.

See Atwood v. Weton, *ante*.

JACKSON v. VAN DUSEN, 5 Johns. 147. Doubtéd, 6 Binn. 487.

JACKSON v. VERNON, 1 H. Blk. Rep. 117.

Not law, *semble* Coote Mortg. 296.

JACOMB v. HARWOOD, 2 Ves. 265.

S. P. as Nugent v. Gifford, *post*.

JENK. CENT. 4 (case 88, page 189). See Curtis v. Groat, *ante*.

JENKE'S CASE, cited 3 Blk. Com. 1326; 6 Howell St. Trials.

Reported, stated from ld. Nottingham's MSS. by ld. Eldon; 2 Swanst. 12, and overruled, p. 65.

JEW v. THIRKWELL, Ca. in Cha. 31.

As to the refusal to apportion the rent, &c.; denied, per Gibson C. J., Whart. 365.

JOHNSON v. PROCTOR, Yelv. 175.

Said by Kennedy J., 3 Penn. R. 226, to have been misapprehended by lord Eldon in Browning v. Wright, 2 Bos. & Pull. 25, and by the court in 16 S. & R. 112; and ld. Eldon corrected by Sugd. Vend., p. 574.

JOHNSON v. WEED, 9 Johns. 310.

Questioned in Milliken v. Brown, 1 Rawle 396.

JONES v. ANDERSON, 4 Yeates 569.

In Cosly v. Brown, 2 Binn. 124, the first position of Jones v. Anderson is overruled; and in Young v. Beatty, 1 S. & R. 74, the residue of the decision is overruled, per Huston J., dissenting, 1 Watts 101; but see 5 Wat's 395.

JONES v. BEALE, 2 Vern. 381.

Overruled, says Sugden Pow. 519 (1 Am. ed.).

JONES, SIR SAMUEL, v. THE COUNTESS OF MANCHESTER, 1 Ventr. 197.

Incorrectly reported, see Sug. Pow. 319, *n*.

JONES v. RADFORD, 1 Camp. 83, note.

Quere, if rightly decided; see 2 Whart. 360.

JONES v. STANLEY, 2 Eq. Ca. Abr. 685, pl. 9.

Is a short and imperfect note of a decision entirely destitute of weight &c., per Tilghman C. J., 3 S. & R. 434.

JORDAN v. SAVAGE, 3 Bac. Abr. 717.

Semble incorrect, Roper Bar. & Fem. 1 vol. 476.

JORDAN v. WIKES, Cro. Jac. 332, vol. 3.

Not law, *semble* Roper Bar. & Fem. 93, vol. 1.

JORDAN v. WILKINS, 3 Wash. C. C. Rep. 112.

Opinion of Washington J. denied, in 4 Watts & Serg. 549.

JOSSELYNE v. AMES, 3 Mass. 274.

The correctness of this decision not acknowledged, 13 S. & R. 315.

JUDAH v. HARRIS, 19 Johns. Rep. 144.

S. P. as Keith v. Jones, *infra*.

KEILWAY 104 b.

That if a man take a wife seised of a reversion on a lease for life, whereupon a rent was reserved, he may be tenant by the curtesy of the rent, but not of the reversion; he shall be tenant &c. of neither, per Kennedy J., 5 Rawle 163.

KEITH v. JONES, 9 Johns. Rep. 120.

That a note payable in New York state *bills* or specie, is negotiable, denied; see 10 S. & R. 94, and 4 Watts 401.

KELLOGG v. INGERSOLL, 2 Mass. Rep. 97.

Not law in Pennsylvania, per Kennedy J., 9 Watts 155.

KENT'S COM. Vol. 3, p. 38.

The opinion of chancellor Kent that the preference of joint creditors to the funds of a partnership &c., is attributable to an inherent equity in the joint creditors themselves &c., denied, per Gibson C. J., 1 Penn. Rep. 204; see 5 S. & R. 92.

KETELBY v. KETELBY, 2 Dick. 512; 2 Anstr. 527.

Cited and commented upon, *semble* incorrect, 2 Ves. & Beam. 287.

KIDD v. RIDDELL, 2 Yeates 444.

Inconsiderately decided, and imperfectly reported, 4 Whart. 15.

KIDNEY v. COUSSMAKER, 12 Ves. 154.

Cannot be cited here as an authority for anything whatsoever, and from which, in the broad terms on which the principle is predicated, I entirely dissent; Gibson C. J., 1 Rawle 171.

KIMMEL v. KINT, 2 Watts 432.

The condition of a replevin bond is to prosecute the suit with effect, and make return of the goods &c., if a return thereof shall be adjudged; it is not as is erroneously supposed in Kimmel v. Kint in the alternative, with alternate branches coupled disjunctively, but they are distinct and independent of each other, and a breach of one of them will occasion a forfeiture, &c.; per Rogers J. in Gibbs v. Bartlett, 2 Watts & Serg. 33.

THE KING v. BATHURST.

Cited and explained in the *King v. Storr*, 3 Burr. 1698, 1701; and the latter approved, 5 Binn. 280 (or *Allen v. York*).

THE KING v. DEATH, Cro. Jac. 513.

Examined in its various reports, per *Yeates J.*, 6 Binn. 142.

THE KING v. INHAB. OF EDINGTON, 1 East 288-94.

Something omitted, *semble* 18 Ves. 347.

THE KING v. THE INHABITANTS OF MARTLEY, 5 East 40.

That a pauper may not be removed from the immediate occupancy of his freehold, because it is declared by magna charta, that no one shall be disseised, denied, per *Gibson C. J.*, 2 Whart. 409.

THE KING v. LUFFE, 8 East 193.

Doubted, 1 Sim. & St. 150, *et seq.*

KING v. MEAD, 1 Burr. 542. Overruled, 11 Ves. jr. 529.

THE KING v. MOOR, 2 Mod. 130.

Is contradicted by the *King v. Marriott*, 4 Mod. 145, per *Gibson C. J.*, 5 Watts & Serg. 462.

THE KING v. PECK, 1 Salk. 66. Quere, if law; see 4 S. & R. 111.

THE KING v. TAYLOR, 3 B. & C. 502.

Denied, 8 Watts & Serg. 83; see 3 Penn. Rep. 263.

KING v. THORN, 1 T. Rep. 489.

Dictum of *Buller J.* as to executor paying costs, denied, 3 Rawle 377.

THE KING v. TURNER, 13 East 231.

"Is, to say the least of it, an odd case," per *Gibson C. J.*, 5 Watts & Serg. 463.

KING, EXPARTE, 1 Atk. 300.

Incorrect, *semble* *Coots Mortg.* 401.

KING v. HOPPER, 3 Price Exch. 495.

In part dissented from, per *Huston J.*, 8 Watts 137; but see 2 Whart. 472.

KLINE v. GUTHART, 2 Penn. Rep. 490.

The reasoning of the chief justice on the first point in that case, overruled &c., in 3 Watts & Serg. 70-1.

KLOCK v. CRONKHITE, 1 Hill 107.

Commented on and explained, 6 Hill (N. Y.) Rep. 65.

KNIGHT v. CALTHORPE, 1 Vern. 347.

"Not law," *semble* 5 Sim. Rep. 295.

KNIGHT v. LD. PLYMOUTH, 3 Atk. 480; 1 Dick. 120.

Overruled in effect, 11 Ves. jr. 381.

KNOTT, EXPARTE, 11 Ves. jr. 609.

"Manifestly incorrectly reported," Coote Mortg. 429-30.

KOHR et ux. v. FEDDERHAFF, 4 S. & R. 248.

Directly contrary to *Dasher v. Leinaweaver*, 3 S. & R. 200, per Huston J., 17 S. & R. 340; and the latter seems to be approved, &c.

KYD ON AWARDS. Error in, 4 Rand 279.

LACLOUGH v. FOWLE, 3 Esp. 114.

The case cited by Erskine as having been decided per Gould J., denied, 1 Barn. & Adol. 450; see 6 Whart. 426.

LAMPLEY v. THOMAS, 1 Wils. 193.

That a *latitat* would not run into *Wales*, overruled in *Penry v. Jones*, Doug. 213.

LANDIS v. BIGLER, cited in 1 Rawle 347.

That whilst a rule to *arbitrate* remains, the cause is out of court, &c., denied, 10 Watts 133.

LANGDON v. HALLS, 5 Esp. 156.

That parol evidence of a notice cannot be given, without a notice to produce it, &c., denied in 3 Rawle 358.

LANSDOWN v. LANSDOWN, Mosely Rep. 264; 2 Jac. & Walk. 205.

Where Id. King is reported to have said, that the maxim *ignorantia non excusat* was in regard to the public; that ignorance cannot be pleaded in excuse of crimes, but it did not hold in civil cases, denied, as to civil matters, per Rogers J., 7 Watts 374.

LATHROP v. MARSH, 5 Ves. jr. 259.

Cannot be supported, 16 Ves. jr. 174, n.

LAXTON v. PEAT, 2 Camp. 185.

"Has been abandoned, overruled, and considered one of the very few mistakes made by Id. Ellenborough at *nisi prius*," per Tilghman C. J., 9 S. & R. 238, and denied, 6 Cow. 492.

LAWLEY v. LAWLEY, 9 Mod. Rep. 32.

Inaccurate, 2 Jac. & Walk. 171; stated Lib. Reg.

LD. CLIFFORD'S CASE, 18 Ass. 18.

Was much shaken if not entirely overruled, by the decision in Cromwell's case, 2 Rep. 78, per Gibson C. J., 5 S. & R. 383.

LD. ORMOND v. ANDERSON, 2 Ball & Beatty 370.

See Fowle v. Freeman, *ante*.

LEACH v. DEAN, 1 Cha. Rep. 78. Very imperfect, 18 Ves. jr. 91.

LEAK v. MORRICE, 2 Cha. Ca. 135; 1 Eq. Ca. Abr. 23.

Commented upon, Beam. Eq. Pl. 181; S. C. 1 Dick. 14; stated very differently from Lib. Reg.

LEAR v. EDMONDS, 1 B. & Ald. 157.

Opinion of Bayley J. questioned by Kennedy J., in 6 Whart. 464.

LECHMERE v. HAWKINS, 2 Esp. Rep. 626.

Commented on by Rogers J., 3 Whart. 279.

LEICESTER, EARL OF v. WALTER, 2 Camp. 251.

That defendant under the general issue (in slander, &c.), without a justification, might prove that the plaintiff had been generally suspected of the offence imputed to him, denied, 4 Rawle 296; see Stark. Ev. vol. 2, p. 469; 8 Watts & Serg. 310; 11 Price 283.

LENNOX v. FRONT, 3 Wheat. 120.

Disputed, 7 Watts & Serg. 342-7.

LESSEE OF LARIMER et ux. v. IRWIN, cited in 4 Binn. 104.

Questioned 6 Binn. 497; and see 2 S. & R. 7; 11 S. & R. 434.

LEWIS v. CULBERTSON, 11 S. & R. 60.

Dictum of Duncan J., that a plea of payment with notice of set-off, will under the defalcation act of 1705 preclude the plaintiff from afterwards taking a nonsuit, denied, per Kennedy J., 7 Watts 499.

LEWIS v. SMITH, 2 S. & R. 142. See Thompson v. Phillips, *post*.

LEWIS v. WILLIAMS, 6 Whart. 264.

The *principle* of it said, per Gibson C. J., 3 Watts & Serg. 278, to have been doubted by Story J., United States v. Lyman, 1 Mason 505.

LIGHTBODY v. THE ONTARIO BANK, 11 Wend. 1; S. C. affirmed, 13 Wend. 101.

That payment in the notes of an insolvent bank is no better than payment in counterfeit coin, &c., denied in *Bayard v. Shunk*, 1 Watts & Serg. 96; see 8 Yerger 175; 6 Mass. Rep. 182.

LIGHTFOOT v. CRERA, 8 Taunt. 268.

S. P. as *Child v. Morley*, *ante*.

LIGHTBOURN v. HOLLIDAY, 2 Eq. Abr. 1 pl. 5.

May now be considered as entirely overruled; Kennedy J., 4 Rawle 182.

LINCOLN v. HUTCHINS, 11 Mass. Rep. 350.

That an action may be maintained against a selectman, &c., for refusing to receive the vote of a qualified elector, though not chargeable with *malice*, denied, 11 S. & R. 40.

LINGHAM v. WARREN, 2 B. & B. 36; S. C. 6 Eng. Com. Law Rep. 10.

Denied in 6 Whart. 467; see 12 Mod. 658; 1 Salk. 248.

LISLE v. GREY, *sir T. Jones* 114.

Erroneously said (2 Jones), to be reversed, 1 Ves. 147; 2 Atk. 574.

LITTON v. FALKLAND, 3 Cha. Rep.

Loose, &c., reported, 1 Ves. 494.

LIVINGSTON v. EXEC. OF LIVINGSTON, 3 Johns 189.

Questioned, see 7 Johns. 106; 6 Watts 174; *Brown v. Furer*, *ante*.

LODDINGTON v. KIME.

As reported 3 Lev. 431, not correct in some particulars, 1 P. Wms. 433.

LODGE v. DICAS, 3 B. & A. 611.

Overruled in 2 C. & M. 626, and in cases cited in *Brown on Actions at Law*, p. 139.

LLOYD v. GREGORY, Cro. Car. 502; 2 Roll. Abr. 24, 495; 1 Roll. Abr. 728.

The true report is in *sir William Jones' Rep.* 405; *Bingh. Infan.* 30, n.

LONG v. LONG, 5 Ves. jr. 445.

"Hasty decision," says Mr. Sugden, *Pow.* 445

LONG v. WHARTON, 3 Keble 304.

Inaccurately reported, but good law, 2 Ves. 143.

LOYD v. WILLIAMS, Ca. Temp. Hard. 123. Denied, 6 Binn. 319.

LUBBOCK v. POTTS, 7 East 449. Denied, 1 Maul. & S. 55. -

LUDDINGTON v. KIME, 1 ld. Raymond 203.

"Has never yet been doubted," per Gibson C. J., 3 S. & R. 453.

LUTHER v. KIRBY, 3 Vin. Abr. 148; 3 P. Wms. 169.

A questioned authority, Cornish on Uses 78.

LYDDALL v. WESTON, 2 Atk. 19. Doubted, 16 Ves. jr. 393.

LYONS v. BARNES, 2 Stark. 36-39.

Overruled by *Bianche v. Nash*, 1 M. & W. 546; but quere, and see the case of Lyons.

MACKIE'S EXEC. v. DAVIS, 1 Wash. Rep. 219.

Not law in Pennsylvania, &c., 17 S. & R. 405; doubted, 1 Penning. Rep. 30.

MADD. REP.

Quere, if of good authority, see 1 ld. Raymond 670; 4 Watts 280.

MAGRATH v. CHURCH, 1 Caine (N. Y.) Rep. 196.

Denied, 4 Binn. 511.

MARLBOROUGH, DUKE, EXRS. OF v. WIDMORE.

S. P. as *Bearcroft v. The Hund. of Barnh. and Stone*, *ante*.

MARSH v. ASTRAY, Cro. Eliz. 175.

This case seems not to be law, per Gibson C. J., 9 S. & R. 394.

MARSHALL ON INS.

His book does not seem equal in point of merit to Park, whose accuracy has never been doubted, and who has argued most of the late cases in the king's bench, per Shippen C. J., 3 Yeates 452.

MASON v. JACKSON, 3 Lev. Co. Denied, 2 Rawle 377.

MASSEY'S HEIRS, LESSEE OF v. LONG, 1 & 2 Ohio Rep. 412, ed. of 1833.

S. P. as in *Brown v. M'Cullough*, *ante*.

MASTERS v. MILLER, 4 T. Rep. 320.

The notion held by the majority of the court, that a blot, &c., on a bill of exchange, which *prima facie* varies the rights of the parties, cannot be shown to have not been fraudulent in fact, ought never to be received as law in this country. The opinion of justice Buller who dissented, is unanswered and unanswerable, per Gibson C. J., dissenting, 6 S. & R. 375.

MEADE v. DEATH, 1 ld. Raymond 742.

Not law, *semble*, 6 Cow. Rep. 300.

MEADE v. LD. ORRERY, 2 Ves. 235; 3 Atk. 235.

Is not correctly stated, 17 Ves. jr. 161, and it is overruled, *ib.* 164-5; S. P. as Nugent v. Gifford, *infra*.

MEASON v. PHILLIPS, Addison Rep. 246.

"The measure of damages for the delivery of goods purchased, is their value at the day specified for delivery, and not afterwards," per Gibson C. J., 3 Penn. Rep. 518; 11 S. & R. 445; contra, 3 Conn. 58; 5 Wend. 393.

MEGGOTT v. MILLS, 1 ld. Raym. 286.

Wholly irreconcilable with principle, and not law, 5 S. & R. 260.

MEHAFFY v. DOBBS, 9 Watts 363.

Corrected in 2 Watts & Serg. 299.

MERCEIN v. ANDREWS, 10 Wend. 461. Denied, 1 Whart. 391.

MEREDITH v. SHEWELL, 1 Penn. Rep. 495.

Questioned by Sergeant J., 2 Whart. 471.

MESSINGER v. KINTNER, 4 Binn. 97.

Every time that case has been mentioned, an apology for it has been attempted, per Huston J., 2 Watts & Serg. 303.

MEYERS v. IRWIN, 2 S. & R. 368.

Questioned, see 2 Whart. 354, and Cruger v. Armstrong, *ante*.

MILES v. CATTLE, 6 Bing. 743; S. C. 19 Eng. Com. Law Rep. 219.

Dicta of some of the judges denied, in 6 Whart. 427.

MILES v. SPENCER, Holt's N. P. 534.

S. P. as Leicester v. Walter, *ante*.

MILLER v. SHAW, 7 S. & R. 129. Explained in 3 Watts 72.

MILLER v. VAN ANKEN, 1 Wend. 516.

Commented on and explained, 6 Hill (N. Y.) Rep. 610.

MILLIKIN v. BROWN, 1 Rawle 391.

Explained to mean, that a release to one of two or more joint debtors will not discharge the others who assented to it, &c., 2 Penn. Rep. 63; see 6 Ves. 146.

MILNE v. MORTON, 6 Binn. 361.

Dictum of Tilghman C. J., doubted by Gibson C. J., 1 Penn. Rep. 125.

MILLS v. STAFFORD, Peak N. P. 240.

Overruled by *Tiley v. Coursin*, K. B. 1817; *Byles on Bills* 11.

MITCHELL v. NEAL, Cowp. 828.

Overruled expressly in *Bugess v. Freelove*, 2 Boss. & P. 425; restored, *semble*, by *English v. Purser*, 6 East 395; 1 Hall's Law Jour. 366.

MITCHELL'S EXEC. v. STEWART ET AL., 13 S. & R. 295.

Dictum, that a landlord claiming to be paid his rent out of proceeds of an execution, *looses his lien*, unless he gives notice before the writ is returnable, denied, 5 Watts 139.

MOLIERE'S LESSEE v. NOL, 4 Dallas 450.

That on a judicial sale a mortgage is not divested, overruled in 3 Rawle 130.

MONEUGH v. BUTLER, 12 S. & R. 157.

S. P. as *Geddes v. Hawk*, *ante*.

MOODY v. VANDYKE, 4 Binn. 41.

Commented on, per Gibson C. J., 4 Watts & Serg. 22.

MOONE v. CLYPSAM, All. 33; S. C. Sty. 71.

Fully considered and overruled, 2 Saund. 74, b., n.; 8 Watts 39.

MOONEY v. LOYD, 5 S. & R. 452. Overruled in 2 Penn. Rep. 75.

MOOR v. ———, 1 Maul. & Selw. 284.

Denied in 4 Rawle 296, and in 8 Watts & Serg. 310; 11 Price 268.

MOORE v. THE EARL OF SCARBOROUGH, Eq. Ca. Abr., vol. 2, p. 156, pl. 7.

"Loose note," *Rop. Bar. & Fem.*, 2 vol. 134.

MOORE v. REES, 13 S. & R. 436. S. P. as *Brown v. Furer, ante.*

MORGAN v. MORGAN, 5 Madd. C. 245.

So far as it impugns *Hearle v. Greenbank*, 1 Ves. 298; 3 Atk. 716; overruled in 4 Watts & Serg. 99.

MORGAN v. RICHARDS, 1 P. A. Browne 171.

Said that a contract made on Sunday was void by *common law*, denied, 6 Watts 234; 3 Watts & Serg. 446.

MORGAN v. SCUDAMORE, 2 Ves. jr. 316; 3 Ves. jr. 197.

Incorrect, *semble*, 5 Madd. Rep. 377.

MORGAN'S PRECED., 202, 205.

In *Ward v. Clark*, 2 Johns. 10, the precedents in *Morgan & Richardson's Practice* in the K. B. are treated with bare respect by the supreme court of New York; and the point is ruled against the weight of their authority, per *Gibson C. J.*, 12 S. & R. 428.

MORRIS v. EDWARDS, 1 Ohio Rep. 194.

S. P. as *Keith v. Jones, ante.*

MORRIS v. FOREMAN, 1 Dallas 193.

"This is but a short note of the case without any statement of facts, and seems more extensive than the principle of the case will warrant," per *Bradford J.*, 2 Dallas 147, by whom the facts of it are given; see 1 Yeates 99.

MORRIS v. MILLER, 4 Burr. 2057.

In actions for *crim. con.*, the confessions of the defendant are not evidence to prove marriage, denied, per *King J.*, by whom the subject is thoroughly reviewed, 1 Ashmead Rep. 273; see 8 S. & R. 161.

MORRIS v. ROSSER, 3 East 15.

Not law, *Chamb. Land. & Ten.* 267.

MORRIS'S LESSEE v. VANDEREN, 1 Dall. 64.

Corrected in 1 Watts 428.

MOSELY'S REPORTS.

Of moderate authority, 1 Binn. 213; see 2 Swanst. Rep. n. 195; 19 Ves. 488; 1 Meriv. 92.

MOSES v. HENISH, 5 Ves. jr. 692.

Not authority, see *Roper*, vol. 2, Bar. & Fem. 250.

MOSES v. MFARLAN, 2 Burr. 1005.

As to the authority of this case, it has been always suspected, and has lately been overruled, on the principle that the previous decision there brought into question was pronounced by a competent court, per Chase J., 4 Dallas 340; 1 S. & R. 51; see 2 Munf. 275.

MOUNTFORD v. CATESBY, Dyer Rep. 328; (*a.*) and *in marg.*

Agreement that lessee should enjoy quietly, &c., *without the eviction or interruption of any one*, will bind the lessor against *wrongful* entries; quere, see 3 Saund. 178, note 8.

MULLIKEN v. AUGHENBAUGH, 1 Penn. Rep. 125.

I erred in asserting in this case, that the *construction* as well as the existence of foreign laws is for a jury, and not for a court, per Gibson C. J., 1 Penn. Rep. 398.

MURE v. KAY, 4 Taunt. 34, 43.

"It has been generally understood, that *by the comity of nations*, the country in which a criminal is found, has aided the police of the country against whom the crime has been committed, in bringing the criminal to justice," &c. Dictum of Heath J. denied, per Tilghman C. J., 10 S. & R. 130.

MURRY v. BAKER, 3 Wheat. 541. Questioned, 9 S. & R. 293.

MURRY v. RIGGS, 15 Johns. Rep. 571.

Has been overruled, per Bronson J., 6 Hill (N. Y.) Rep. 438.

M'CALL v. LENNOX, 9 S. & R. 304. Explained in 10 Watts 436.

M'CARTY'S LESSEE v. REED, 5 Ohio Rep. 221.

S. P. as in *Brown v. M'Cullough*, *ante*.

M'COY v. PORTER, 15 S. & R. 571.

Has been reconsidered, see 17 S. & R. 59; 1 Whart. 101.

M'CULLOUGH v. HOUSTON, 1 Dallas 444.

Questioned, 12 S. & R. 265; overruled in 7 Watts 328, and 5 Watts & Serg. 369.

M'CULLOCH v. MONTGOMERY, 7 S. & R. 17.

Dicta of Tilghman C. J., denied in 1 Watts 515.

M'DILL'S LESSEE v. M'DILL, 1 Dallas 63.

Repudiated in 1 Binn. 190; 8 Watts 382; see 4 Rawle 165.

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M'GREW'S APPEAL, 14 S. & R. 396.

Some of the expressions used require limitation, perhaps correction, per Huston J., 17 S. & R. 341.

M'KETH v. SYMMONS, 15 Ves. jr. 335.

Not accurate in one particular; *semble*, Coote Mortg. 376.

M'KIES' EXEC. v. DAVIS, 2 Wash. Rep. 219.

Doubted, 1 Penning. Rep. 30.

M'KILLIP v. M'KILLIP, 2 S. & R. 489.

Not clearly reported, and see it explained, 8 S. & R. 401.

M'LAUGHLIN v. SCOTT, 1 Binn. 61.

Questioned, 3 Binn. 323; overruled, 4 Binn. 5.

M'LEAN v. FINDLEY, 2 Penn. Rep. 97. Corrected, 8 Watts 287.

M'MIAN v. RICHMOND, 6 Yerg. Rep. 1.

That the negotiable note of an infant is void, and not voidable only; contra, Hesser v. Steiner, 5 Watts & Serg. 476; see Goodsell v. Myers, 3 Wend. 479; Gr. Ov. Cas.

M'VEAGH v. GOODS, 1 Dallas 62.

Quere, if not overruled, see 4 S. & R. 226.

NASH v. GILKESON, 5 S. & R. 352.

If testimony is erroneously admitted, it cannot be corrected by directing the jury to disregard it, &c., denied in 8 Watts & Serg. 401.

NEGLEY v. STEWART, 10 S. & R. 207.

That immediately on the property (real estate at sheriff's sale), being struck down, the purchaser must pay the money, or the sheriff may put it up again, &c.; as a universal proposition, I do not agree to this, &c., per Huston J., 2 Penn. 17.

NELSON v. DIXIE, Cas. Temp. Hard. 305.

That words in the second person are supported by proof of words uttered in the third person, denied, 7 S. & R. 226; and see 12 S. & R. 429.

NEWLAND ON CONTRACTS. Good book, 5 Munf. 318.

NEWLIN v. NEWLIN, 1 S. & R. 275.

Hastily determined on an exception to evidence, &c., 1 Rawle 248.

NEWMAN v. WALLIS, 2 Bro. C. C. 143.

Overruled, Beam. Eq. Pl. 123; see Gunn v. Pryor, *ante*.

NIXON v. LONG, 1 Dallas 6.

An imperfect note of an erroneous decision, yet too deeply seated to be abruptly eradicated; per Gibson C. J., 3 Watts & Serg. 151.

NOEL v. DICKEY, 3 Bibb 258; see *The Comm. v. Murphy*, *ante*.

NORTH v. CROMPTON, 1 Cha. Ca. 196; 2 Vern. 253.

Doubted, 1 Ball & B. 543; see 1 Ves. & B. 270.

NORTHAMPTON'S (EARL OF) CASE, 12 Coke Rep. 133; 4 Res. Commented upon, 4 B. & Ald. 614; and see Pennington's Rep. 185.

NORTON v. ROUSE, 1 Binn. 460.

Is generally given up as indefensible, per Gibson C. J., 5 Watts 397.

NUGENT v. GIFFORD, 1 Atk. 143.

The principle of overruled in *Crane v. Drake*, 2 Vern. 616; see 11 S. & R. 386; 1 Cox's Ca. 145, *et seq.*; see 17 Ves. jr. 163; 4 Bro. C. C. 136.

NYE v. OTIS, 8 Mass. 122.

As to the form of declaring &c., denied, 12 S. & R. 428.

OGDEN v. MILLER, 1 P. A. Brown Rep. 147.

Corrected, see 6 Watts 67.

OGILVIE v. FOLEY, 2 W. Blk. 1111.

Has been overruled, per Gibson C. J., 1 Watts 62; see 3 Saund. 187, a., n. 2.

OSTERHOUT v. ROBERTS, 8 Cowen 43.

S. P. as *Curtis v. Groat*, *ante*.

PAIN v. COLLEDGE, 2 Roll. 312.

Questioned in *Laws on Asspt.* 168.

PALMER, SIR THOMAS' CASE, Noy 202. S. C. Moore 815, pl. 1103. Denied, per Gibson J., 9 S. & R. 345.

PALMES v. DANBY, Prec. Cha. 137.

Was a mortgage for *years*, 2 P. Wms. 717.

PARISH v. STEVENS, 3 S. & R. 299.

"That on a sale of unseated land for taxes, if no tenant is on the land, the law will presume the purchaser for taxes to be in possession," overruled in 8 S. & R. 364, and 4 Watts & Serg. 38, 167-8; and see 3 do. 515.

PARROT v. AUSTIN, Cro. Eliz. 232, case 2.

That a testator cannot bind his executor where he is not bound himself, doubted, 2 Rawle 191.

PASLEY v. FREEMAN, 3 Term Rep. 51.

Seems to have been considered as law by Id. Eldon, notwithstanding his observations on the case, 6 Ves. 186; 3 Ves. & B. 110, *et seq.*; see 6 Cowen 353.

PEACOCK v. MONK, 1 Ves. 128.

S. P. as Clarkson v. Hanway, *ante*.

PEACOCK v. PEACOCK, 16 Ves. 56.

Denied, per Rogers J., 1 Whart. 388.

PEEBLES v. REEDING, 8 S. & R. 494.

Has been much doubted, particularly in Kesler v. Kesler, 2 Watts 323, per Rogers J., 9 Watts 35.

PEIGNE v. SUTTON, 4 M'Cord 397. Questioned, 6 Watts 12.

PEOPLE v. HUMPHREY, 7 Johns. Rep. 314.

See Morris v. Miller, *ante*.

PERK., sect. 118. See Sheph. Touchs., *infra*.

PETER v. KENDALL, 6 B. & C. 703.

That the owner of a ferry has no right to land his boats on the public road; contra, 1 Yeates Rep. 167; 9 S. & R. 26.

PETRIE v. HANNAY, 3 T. R. 418.

Overruled, 3 Barn. & Ald. 181.

PHILIPS v. BIGGS, Hardress Rep. 164.

Was never decided, 12 Moo. 252.

PHILLIPS v. THE DUKE OF BUCKS, 1 Vern. 227.

Corrected in Mr. Raithby's ed. of Vern., p. 229; see 6 Watts 540.

PHILLIPS v. EAMER, 1 Esp. Ca. 357.

Denied, per Gibson C. J., 6 Watts & Serg. 77; see Rex v. Brooks, *infra*.

PHILLIPS ON EVIDENCE.

Character of, by Gibbs C. J., 8 Taunt. 457.

PHILLIPS' EVIDENCE.

"And here I take occasion in broad terms to dissent from the doctrine broached in Mr. Phillips' Ev. 211, that a witness actually sworn, though not examined by the party who has called him, is subject to cross-examination by the adverse party, and that the right to cross-examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case, and for that purpose ask him leading questions," &c., per Gibson C. J., 16 S. & R. 77; see 2 Watts & Serg. 506; 6 Watts & Serg. 75; and see 17 Pick. 490.

PHIPPS v. STEWART, 1 Atk. 285.

Not correctly reported, 2 Ves. & Beam. 88-9.

PICKERING v. REYNOLDS, 4 Burr. 2049.

As to the distinction taken between acts *mala in se* and *mala prohibita*, when applied to actions in court on contracts, denied, 7 Watts & Serg. 234-5.

PIERCE v. CROFTS, 12 Johns. 90.

S. P. as *Cruger v. Armstrong*, *ante*.

PIERSON v. GARNET, 2 Bro. C. C. 63.

Overruled, *semble*, Sug. Pow. 510, 1 Am. ed.

PIKE v. CROUCH, *Id.* Raymond 730.

That if counsel have permitted a legatee to be examined without objection, they cannot afterwards except to him, not now the law, 2 Yeates 39; 2 Vern. 464.

PINNEY v. GLEASON, 5 Wend. 393.

See *Meason v. Phillips*, *ante*.

PLATT v. HIBBARD, 7 Cowen 501. Denied in 10 Watts 337.

PLATT v. SPRIGG, 2 Vern. 303.

"Singular decision," by *Id.* Eldon, 16 Ves. jr. 303.

POLE v. FORD, 2 Chitty Rep. 125. Denied, 7 Watts & Serg. 340.

POLE v. LD. SOMERS, 6 Ves. jr. 309.

Questioned, 1 Swanst. 401, n.

POPE v. BISH, 1 Anstr. 59. Doubted, Beam. El. Eq. Pl. 31.

POPE v. FOSTER, 4 T. R. 590.

That an averment in pleading the day of a former trial, must exactly

agree with the record produced in evidence, though it is laid under a videlicet, overruled in *Purcell v. M'Namara*, 9 East 157, and by *Stedart v. Palmer*, 2 Barn. & Cres. 2.

POPE v. SIMPSON, 5 Ves. 446.

Not correctly decided, 10 Watts 309; 11 Ves. 345; 18 Ves. 512.

POPE v. TWINER, 4 Taunt. 818.

Marg. abstract incorrect, 127-8 Taunt.; see *Haynes v. Jones*, *ante*.

POSTLEWHAITE v. GIBSON, 3 Esp. Rep. 226.

Doubted, in *Parton v. Williams*, 3 Barn. & Ald. 330.

POTHIER.

"His authority very high—next to a judicial decision in this country," per Best J., 5 Barn. & Ald. 480-1.

POTTER v. ETZ, 5 Wend. 74.

Commented on and explained, 6 Hill (N. Y.) Rep. 389.

POTTS v. GILBERT, 3 Wash. Rep. 475.

Overruled in 7 S. & R. 177; 6 Watts 378.

POTTINGER v. WIGHTMAN, 3 Merivale 67.

The principle of it doubted, per Gibson C. J., 2 Watts & Serg. 571.

POWELL ON DEVICES, p. 302.

Whether upon authority to executors, the survivor may sell, denied, per Yeates J., 3 Binn. 72-3.

POWER v. WELLS, Doug. 24; Cowp. 818.

Imperfectly reported, 12 Wheat. 190.

POWNAL v. FERRAND, 6 Barn. & Cres. 439.

See *Cruger v. Armstrong*, *ante*.

PRATT v. STRYER, 1 P. A. Brown's Rep. 282.

The report of that case is summary, and the reasons given for the judgment unsatisfactory, per Gibson C. J., 4 Watts & Serg. 203.

PREECE v. CORRIE, 5 Bing. 24.

"Is a decision on the letter of the statute of frauds, without a pretence of assertion that it accords with the intent, and it violates a cardinal rule of construction," per Gibson C. J., 7 Watts 124.

PRESBYTERIAN CORPORATION v. WALLACE, 3 Rawle 169.

That the purchasers of different tracts of land at different times, sub-

ject to the payment of a mortgage upon the whole, shall contribute *pro rata* to the payment of the mortgage, according to the relative value of their respective tracts, denied, per Kennedy J., 1 Barr 279; and Naylor v. Stanly, 10 S. & R. 450, confirmed.

PRESTON v. CROFUT, 1 Conn. Rep. 527, note.

That a deed fraudulent as against creditors, is void also against a *bona fide* purchaser, see 2 Mason 279.

PRESTON v. PERTON, Cro. Eliz. 817; Roll. 441.

To a scire facias upon a judgment, the defendant may plead a judgment in debt on the same judgment, denied, 2 Watts & Serg. 223; 3 do. 36; see Cowper v. Langworthy, *ante*.

PRESTON ON ESTATES, Vol. 1, p. 132.

That on a grant to husband and wife and a third person, as tenants in common, each of the three will have a distinct and separate estate, &c., denied, per Kennedy J., 6 Watts & Serg. 322.

PRING v. CLARKSON, 1 Barn. & Cres. 14; S. C. 8 Eng. Com. L. 10.

Denied by Kennedy J., 2 Whart. 258, &c.; but see 9 Watts 281.

PROBERT v. BROGHURST, 7 Taunt. 539.

The lord chancellor having called chief baron Richards and chief justice Abbott to his assistance, differed from the court of common pleas, the judges agreeing in opinion with him, 1 Swanst. 309; see the lord chancellor's remarks on the argument in the common pleas, *ib.*, p. 312.

PULTENEY v. LD. DARLINGTON, 7 Bro. P. C. 530.

There is a point (election), not reported, 1 Swanst. 374, n.; questioned, *ib.* 401, n.; and it is unintelligible, because the will of sir William Pulteney is not stated in it, 1 Swanst. 438, n. The will is stated, 2 Ves. jr. 544.

PURDEW v. JACKSON.

The opinion of sir Thomas Plumer disputed, per Gibson C. J. in Sitter's case, 4 Rawle 480, and in 7 Watts & Serg. 169.

PURDON v. JACKSON, 1 Russel 1. See Purdew v. Jackson, *supra*.

PUTBURY v. TREVILIAN, Dyer 142, b.

Overruled (seems), 2 Ves. & Beam. 385.

PUTNAM v. LEWIS, 8 Johns. 304. Questioned, 1 Rawle 396.

THE QUEEN'S CASE, 2 Brod. & Bing. 300.

That evidence of contradictory statements having been made by a witness shall not be given, without first interrogating the witness proposed to be contradicted, &c., denied; and in Pennsylvania it is left to the discretion of the court, &c., 5 Whart. 288.

QUEEN v. READ, Fortesq. 98.

The authority of that case was destroyed in *The King v. Curl*, 2 Stra. 788, per Tilghman C. J., 2 S. & R. 102.

THE QUEEN v. GODDARD, 2 Id. Raym. 922.

No adjudged case supports the dictum of Id. Holt, in *The Queen v. Goddard*, that a defendant can plead over but in treason or *felony*, per Gibson C. J., 3 Penn. Rep. 263; see 8 Watts & Serg. 83.

RABORG v. PEYTON, 2 Wheat. 385.

S. P. as *Cruger v. Armstrong*, *ante*.

RACKSTRAW v. IMBER, Holt N. P. Ca. 368; S. C. 3 Eng. Com Law Rep. 132.

Doubted, per Kennedy J., 4 Watts & Serg. 16; but see 4 do. 144.

RAMSY'S APPEAL, 2 Watts 228.

Imperfectly stated as reported, 8 Watts 447.

RANDALL et ux. v. ———, 2 Madd. 308.

The decision in that case may be correct, yet not for the reason given by the reporter, viz. that the judgment which had been given was not only voidable, but *void*, per Kennedy J., 4 Watts 279–80, & 374.

RANDALL v. MALLET, 14 Maine Rep. 51.

Overruled in *Webber et al. v. Mallet*, Law Rep. Sept. 1839, p. 143–4.

RANDALL v. WILLIS, 5 Ves. jr. 262.

Seems not to be authority, Roper Bar. & Fem. vol. 2, p. 31–2–3; it is inconsistent with *Lewis v. Madocks*, 17 Ves. 48.

RASTALL'S ENTRIES, p. 385, ed. 1670, tit. Jail Delivery, pl. 4. Incorrect, 1 M. & Sel. 188.

READ v. ADAMS, 6 S. & R. 356.

That in an action on a foreign bill of exchange, an indorsee need not prove that the indorser had notice of the non-acceptance of the bill; oppo. *Watson v. Loring*, 3 Mass. 557; *vide* Gr. Ov. Cas.

READ v. CROP, 1 Bro. C. C. 492.

See the judgment stated from Mr. Cox's MSS. n., 1 Swanst. 401, n.

READ'S PRECEDENTS (Pennsylv.)

Mr. Read took many of his precedents from old manuscripts of good authority, &c., see 13 S. & R. 235.

REED v. INGRAHAM, 3 Dallas 505.

Not agreed to, see 17 S. & R. 291.

REEVES DOM. REL., 357-8.

That the master is liable for the wilful acts of his servant, if done *in the immediate performance of his master's business*, denied in 19 Wend. 346.

REID v. DARBY, 10 East 143.

How far impugned by Read v. Benham, 6 Moo. 397.

REMINGTON v. STEVENS, 2 Stra. 1271.

A loose note, 1 Crompt. & Sew. 10.

RETAN v. DREW, 19 Wend. 304.

Explained, 6 Hill (N. Y.) Rep. 10.

REX v. BROOKE, 2 Stark. Ca. 473.

The authority of this case is shaken to its centre by Reed v. James, 1 Stark. Ca. 13; Davis v. Dale, 1 Moody & Malk. 514; Simpson v. Smith, 1 Stark. Ev. 162, note n., per Gibson C. J., 6 Watts & Serg. 77; see 16 S. & R. 77; 1 Crom. M. & R. 94.

REX v. DAWES, 1 Ld. Raym. 722; S. C. 2 Salk. 608.

Overruled by anon., 1 Stra. 479; S. P. Com. Rep. 264.

REX v. FLOWER, 8 Term Rep. 324.

The dictum of Id. Kenyon as to the right to the *habeas corpus*, overruled in Hobhouse's case, 3 Barn. & Ald. 420.

REX v. MEDDLEHURST, 1 Burr. 399.

Quere if law, 7 Dowl. & Ryl. 683.

REX v. NICHOLS, 2 Stra. 1227.

Imperfectly reported, and there is a fuller note in 13 East 411-2.

REX v. PYWELL, 1 Stark. Rep. 402.

Denied, per Gibson C. J., 5 Watts & Serg. 463.

REX v. VINCENT, Stra. 481.

Has been repeatedly overruled, 4 Watts 191.

REX v. WHITING, 1 Salk. 283.

That on an indictment for a cheat, in procuring a note from H. by slight of hand, H. is not a witness against defendant, denied in 2 Yeates 5.

REYNOLDS v. BUCKLE, Hob. 326.

Said the issue there was found for the *defendant*. This is a misprint, it should be for the *plaintiff*, see Comb. 380; 4 Rawle 343.

RICHARDSON v. GREESE, 3 Atk. 65.

The printed report is incorrect, 11 Ves. jr. 548, per ld. Eldon.

RICHARDSON v. THE MARINE INS. CO., 6 Mass. 170.

Denied in 12 S. & R. 444, on the authority of 3 Wheat. 183; see 1 Johns. 249; 15 do. 523.

RICHARDSON'S PRACTICE, K. B. 171. S. P. as Morg. Prec., *ante*.

RICHMOND v. CADOGAN, cited 17 Ves. jr. 67.

Corrects Davenport v. Oldis, 1 Atk. 579, *ante*.

RICHTER v. SELIN, 8 S. & R. 425.

Obiter dictum of Duncan J. corrected, 1 Whart. 225.

RIDLEY v. TAYLOR, 13 East 175. Denied, 11 S. & R. 387.

ROBERTS v. ANDERSON, 3 Johns. Ch. Rep. 371.

Doubted, 2 Mason 279.

ROBERTS v. BARKER, 1 Crompt. & Mees. 809.

The outgoing tenant is entitled to the manure made during the term; contra in Pennsylvania, Barrington v. Justice, 4 Penn. Law Jour. 289, and cases cited.

ROBERTS v. DIXWELL, 1 Atk. 606.

Same as Morgan v. Morgan, *ante*.

ROBERTS ET AL. v. ANDERSON.

That a *bona fide* purchaser from a fraudulent grantee, acquires no title by the conveyance against the *creditors* of the fraudulent grantee, overruled, in S. C. 18 Johns. 515, and denied, 3 Penn. Rep. 165.

ROBERTS ON FRAUD. CONVEY.

Not to be regarded, 3 Johns. Cha. Rep. 491.

ROBINSON v. BLAND, 1 W. Blk. 260; 2 Burr. 1077.

S. P. as in *Barjean v. Walmesly*, *ante*; doubted in 4 S. & R. 360.

ROCKFELLER v. DONNELLY, 8 Cowen 63.

Questioned, per Bronson J., 6 Hill (N. Y.) Rep. 325.

RODNEY v. CHAMBERS, 2 East 283.

Overruled in *Titley v. Durand*, 2 Roper Bar. & Fem. 278.

ROGERS v. ROGERS, 3 P. Wms. 193.

Said to be better reported in *Forester* 268; 1 Ves. & Beam. 271.

ROLLE.

"Respectable as the name of Rolle may be, I cannot avoid observing, that when he cites an authority for his doctrine, we are bound to examine the accuracy of his extract," per *Yeates J.*, 6 Binn. 140.

ROLLE ABR. 606, tit. *Detinue*; citing 9 Hen. VI. 58.

Said that if bailee of goods deliver them to him who has the right, yet be chargeable to his bailor, who in truth has no right, so if the bailee deliver them to the bailor, in such case he is not to be chargeable to the true owner thereof, *ib.* 607, citing 7 Hen. VI. 22; 9 Hen. VI. 58; denied, per *Kennedy J.*, 6 Whar. 421, 443.

ROLLE'S ABR. 390. Incorrect, 2 M. & Sel. 518, 520.

ROPER ON LEG., p. 26.

That a *donatio mortis causa* must be made in peril of death, or during last sickness; the latter denied, per *Gibson C. J.*, 2 Whart. 22.

ROSA v. BROTHERTON, 10 Wend. 85.

"That when a creditor receives the transfer of a negotiable note in payment of a pre-existing debt, he takes it, although transferred to him before maturity, subject to all existing equities between the original parties." That case was not well considered, and has been overruled, per *Rogers J.*, 6 Whart. 232.

ROSE v. HIMELY, 4 Cranch 279. Commented on in 6 Cowen 425.

ROUNDELL v. CURRER, 2 Bro. C. O. 73.

The judgment better stated, 1 Swanst. 382.

ROWLEY v. RIDLEY, 2 Dick. 622.

Questioned, 2 Ves. & Beam. 185, n. b.

ROWLEY v. STODDARD, 7 Johns. 207. Questioned, 1 Rawle 396.

RUGBY CHARITY v. MERRYWEATHER, 11 East 375, n.

Shaken in *Woodyer v. Hadden*, 5 Taunt. 142; 5 Barn. & Ald. Rep. 457; 3 K. C. 450.

SADDLER v. HOBBS, 2 Bro. Ch. Rep. 117.

Dictum of *Id. Thurlow*, that a creditor should not have a right to charge an executor, when legatees should not, &c., denied in 4 Rawle 154; and see 8 Watts & Serg. 148.

SAMM'S LESSEE v. ALEXANDER, 3 Yeates 268.

The dicta of judge Yeates denied in 1 Rawle 227.

SAMPEN v. HATCH, 2 Stra. 934.

That a judgment cannot be confirmed in part and reversed in part, overruled by *Cumming v. Sebley*, 4 Burr. 24-29; see 4 Yeates 548; 7 Mass. 443.

SANDERS v. POPE, 12 Ves. jr. 282.

Overruled, 16 Ves. jr. 403 *et seq.*, and note to *Ingraham's ed.*

SANDERSON'S EXEC. v. LAMBERTON, 6 Binn. 129.

This is one of the few decisions in *Mr. Binney's Reports*, from which my judgment inclines to dissent, per *Gibson C. J.*, 6 S. & R. 439.

SARGEANT'S CASE, 5 Cowen 106.

That a widow whose daughter has been debauched while at service under indentures subsequently cancelled, might maintain an action for the seduction, denied, per *Gibson C. J.*, 2 Watts 477.

SATTERLEE v. MATHISON, 13 S. & R. 133.

In effect reversed by *Tracy v. Overton*, 14 S. & R. 311, per *Huston J.* in *Satterlee v. Mathison*, 16 do. 176-7; see 2 Peters Rep. 380 and 3 Watts 294.

SAVOY v. JONES, 2 Rawle 343.

The question in that case is, perhaps, not definitely settled, see 2 Whart. 197.

SCARBOROUGH, EARL OF v. BARTON, 2 Atk. 111.

Is better reported, *Barnard* 255; *ib.* 160, n.

SCHOCK v. M'CHESNEY, 2 Yeates Rep. 473.

That an action for a malicious prosecution on a criminal charge, will not lie where no indictment has been sent to the grand jury, denied; S. C. 4 Yeates 507; though slander will not; *do.*

SCOTT v. LIFFORD, 1 Camp. 250. Recognised, 1 S. & R. 409.

SCOTT v. M'INTOSH, 2 Campb. 238.

Overruled by *Tompkins v. Willshear*, 5 Taunt. 431; 1 Saund. Pl. & Ev. 76, Am. ed.

SCOTT v. TYLER, 2 Dick. 724.

Mr. Dickens' account of that case confirmed, and the case more accurately stated by *ld. Eldon*, 17 Ves. jr. 166; see 9 Ves. jr. 9, n. a., where S. C. Rep. 2, Bro. C. C. Rep. 431, is commented on.

SURRY v. FREEMAN, 2 Bos. & Pull. 112.

Denied, per *Kennedy J.*, 4 Watts & Serg. 458.

SEIXAS v. WOOD, 2 Caine Rep. 48.

Questioned in 3 Rawle 42-3; but see 1 S. & R. 50, and 1 Watts & Serg. 100.

SELLON'S PRACTICE.

See 3 Barn. & Cres. 551; 5 Dowl. & Ryl. 446, rem. as to authority of.

SELLS v. THE ADM'RS. OF HUBBELL, 2 Johns. Ch. Rep. 397.

Dicta of *Kent C. J.*, denied, see 5 Watts 232.

SETON v. SLADE, 7 Ves. 275.

Dictum of *ld. Eldon*, denied in *Wilson v. Clarke*, 1 Watts & Serg. 556.

SHARPNELL v. BLAKE ET AL., 2 Eq. Ca. Abr. 603.

Incorrect, *semble* *Coote Mortg.* 397.

SHEDDON v. GOODRICH, 8 Ves. jr. 481.

Passages in it incorrectly reported, *semble* 18 Ves. jr. 166.

SHEEHY v. MANDEVILLE, 6 Cranch 263.

"For myself I could wish that case had not been overruled; but it has been overruled in New York, and in this state in 9 Johns. Chan. 265-8; 9 S. & R. 142; and by one of the judges who decided it, in *Peters C. C. Rep.* 301."

SHEP. TOUCH. 513, citing *Plowd.* 307.

"I covenant with B. in consideration of the marriage of my son with daughter of C., to stand seised to use of R. a stranger, for life, and then to use of my son and wife in tail; on this case a use shall rise to R."

398 *Cases Overruled, Doubted, Qualified, &c.*

Rejected, Gilb. on Uses 255. Purposely omitted by Roll. vol. 2, p. 784. Denied, 1 Lev. 195 and 4 do. 137; Cornish on Uses, p. 66-7, and 1 Burr. 282.

SHEPHARD v. WATSON, 1 Watts 36.

Seems is not law, 14 S. & R. 206, and 4 Watts 291.

SHEPHARD'S TOUCH. 54.

"That if a man seal and deliver an empty piece of paper or parchment, albeit he do therein withal give commandment, that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed," has been overruled, 1 Anstr. 229; 6 S. & R. 308, &c., per Rogers J., 17 S. & R. 439.

SHEPHERD v. HAMPTON, 3 Wheat. 204.

Dictum of Marshall C. J., denied, per Rogers J., 5 Watts & Serg. 109.

SHERIDAN'S PRACTICE.

Said by Shippen C. J., to be a work of authority, 2 P. A. Browne Rep. 44.

SHEWELL v. FELL, 3 Yeates 17.

Dictum of Yeates J., that the common law rule as to escapes, was relaxed in Pennsylvania, denied, per Gibson C. J., 2 Penn. Rep. 169.

SHRUNK v. THE PRESIDENT &c. OF THE SCH. NAV. CO., 14 S. & R. 71. Contra, 5 Pick. Rep. 201; 17 Johns. Rep. 195; 20 do. 90; G. Ov. Cas.

SHUTTLESWORTH v. NOY, 8 Mass. 229.

Dictum, that money due upon a note given, payable to the wife during coverture, would go after the husband's death, to his executor, &c., and not to the wife, denied, per Kennedy J., 4 Rawle 181.

SIMMONDS v. LD. KINNAIRD, 4 Ves. 740.

Corrected, 2 Ves. & Beam. 185, n. b.

SIMS v. GURNEY, 4 Binn. 513.

Shaken if not overruled, by Walker v. United States Ins. Co., 11 S. & R. 60, per Kennedy J., 4 Whart. 362.

SIMPSON v. GRIFFEN, 9 Johns. Rep. 131.

Certainly carries the law farther than it is carried in Pennsylvania, &c., 5 Rawle 109.

SIMPSON v. VAUGHAN, 2 Atk. 32. Incorrect, 2 Wash. Rep. 140.

SINGLETON v. BREMEN, 4 M'Cord 12.

"To raise a use by deed of bargain and sale, a valuable consideration must be expressed; but the smallest is sufficient, the amount need not be stated." The law was thus ruled in *Jackson v. Alexander*, 3 Johns. 478 and 18 Johns. 60; though in *Singleton v. Bremen*, it was ruled differently, 1 Watts & Serg. 395.

SKINNER v. DAYTON ET AL., 19 Johns. Rep. 513.

I cite it merely to dissent from a point of doctrine asserted in it on the authority of *Ball v. Dunnsterville*, 4 T. R. 313, that an authority to one partner to bind the others by deed, may in some cases be by parol, per Gibson C. J., 1 Penn. Rep. 290-1.

SKINNER v. STACY, 1 Wils. Rep. 339.

Not fully or carefully reported, Coote Mortg. 339.

SLOCUM v. DESPARD, 8 Wend. 615.

Questioned, per Bronson J., 6 Hill (N. Y.) Rep. 418.

SMALL v. BIXLEY, 18 Wend. 514.

Overruled, 6 Hill (N. Y.) Rep. 353.

SMITH v. BROMLEY, Doug. 696, notes (3d ed.).

Approved, 3 Watts 269.

SMITH v. MERCER, 6 Taunt. 76.

Doubted, 5 Dowl. & Ryl. 409, 411.

SMITH v. JOHNSTON, 1 Penn. Rep. 471.

That by a sale, conveyance and delivery of possession of land, the grain growing thereon, does not pass to the vendee, overruled, 3 Watts 394; 7 Watts 379; 9 Watts 46; 3 Johns. 222.

SMITH v. RICHARDSON, &c., 3 Caines 219.

That in an action for refusing to carry goods, &c., the damages shall be estimated at the port of *embarkation*, denied in 12 S. & R. 186-7.

SMITH v. SHELBURY, 2 Mod. 34. Denied, 1 Salk. 171.

SNAG v. GEE, 4 Co. 16. Denied, 10 S. & R. 48, and cases cited.

SNIDER AND VANVECTER v. M'CROY, 2 Johns. 227.

Dissented from, 6 S. & R. 60.

SNYDER v. VANVETCHEN, 2 Johns. Rep.

Doubted, 6 S. & R. 60.

SOULLE v. GERARD, Cro. Eliz. 525. S. C. Moor 422; Noy 64, 525.

Said by lord C. J. Willes to be of little authority, Willes Rep. 311; and see 7 Har. & J. 245—(though it seems to be recognised in *ld.* Raymond 506, *sed vide* S. C. 12 Mod. 277; Comyn 95; and see 3 T. R. 474)—and to be stated but obscurely, &c., per Yeates J., 3 Yeates Rep. 227-9.

SOUTHERLAND v. PARRY, 2 Penn. Rep. 145.

Quere, if reconcilable with *Smith v. Webster*, 2 Watts 478; or if sustainable at all, 5 Watts 167; see 9 Watts 316.

SOWTON v. CUTLER, 2 Cha. Rep. 57.

Full of verbal inaccuracies, Beam. Eq. Pl. 143, n. 3.

SPARKS v. GARRIGUES, 1 Binn. 152.

Dicta of Tilghman C. J. as to issuing an execution, by motion to the court instead of a *sci. fa.*, &c., denied, 1 Watts 62.

STACK v. LEONARD, 9 Mod. 91. Disapproved, 19 Ves. jr. 141.

ST. ALBANS, DUKE OF v. BEAUCLERK, 2 Atk. 636.

Incorrect, 5 Madd. Rep. 358; see 1 Bro. C. C. 389.

STANFIL v. HICKS, 1 *ld.* Raym. 280. S. C. 2 Salk. 413; *ib.* 135.

S. P. as *Bellasyse v. Burbridge*, *ante*; and see *Doe d. Clark v. Smanidge*, Law Library for June, 1846, p. 500.

STARKIE EV. page 186.

The rule by Starkie as to when a party may confirm the character of an impeached witness, contradicted, per Rogers J., 9 Watts 125; 8 Pick. 154; 19 Wend. 593.

STARRETT'S CASE, 1 Dallas 356.

Overruled, 1 Yeates 25; 4 Dallas 124; and see *do.* 388, note 1.

THE STATE v. DICKEY, 4 Halstead 293.

That a civil injury which is not indictable when committed by an individual, does not contract the quality of guilt by being the act of a confederacy; *contra*, *The State v. Buchanan*, 5 Har. & J. 317, and 5 Watts & Serg. 464.

STATE v. DOUGHERTY, 2 Tenn. Rep. 80.

S. P. as *Curtis v. Strong*, *ante*.

THE STATE v. STALLINGS, 2 Hayw. 300.

See the *Commonwealth v. Murphy*, *ante*.

STAUNTON v. OLDHAM, 2 Atk. 383.

Not correctly reported, 1 Myl. & K. 635.

STEELE v. THE PHOENIX INS. CO., 3 Binn. 306.

"The time is come when the doctrine in this case must be exploded altogether," per Gibson C. J., 1 Barr 365.

STEIGLITZ v. EGGINTON ET AL., Holt Rep. 141.

Denied in Taylor et al. v. Corryell et al., 12 S. & R. 249; see 5 Watts 159; and Harrison v. Jackson, 7 T. R. 207, *ante*.

STEINHAEUER v. WITMAN, 1 S. & R. 438.

Explained, 9 S. & R. 161-2.

STEWART v. THE COMMONWEALTH, 4 S. & R. 195.

Dictum of Duncan J., that the notes charged in the indictment should be described as being "*due and unpaid*," denied per Kennedy J., 4 Rawle 466.

STONER v. GIBSON, Hobart 81, *b*.

That if defendant plead in bar a plea which is good, and the plaintiff demur to it, and the defendant pending the demurrer, pleaded another matter, *puis darrein continuance*, which is decided against him either on demurrer or on trial, still he would be entitled to the benefit of his first plea, &c.; but in this case, according to Moore 871, pl. 1210, it was resolved that a plea, *puis darrein continuance*, could not be pleaded after a demurrer, per Kennedy J., 4 Rawle 92, which see.

STORY EQ. JURIS. 472, note 2.

That a surety who has paid the debt, &c., is not entitled to the assignment of the security against his principal or his co-surety, questioned, per Gibson C. J., 9 Watts 453.

STORY EQ. JURIS., sect. 497.

"If one of the *sureties* dies, the remedy at law lies only against the surviving *parties*; but in equity it may be enforced against the representatives of the deceased *party*, and he may be compelled to contribute to the surviving *surety*, who shall pay the whole debt."

By the term "*sureties*" here, I apprehend that *joint debtors* merely are meant, and it cannot be supported by any other meaning, &c., per Kennedy J., 2 Whart. 364.

STORY'S EQ. Vol. 2, sect. 1233, citing Barnes v. Rackster, 1 Younge Coll. 401, &c.

So far as it conflicts with Clowes v. Dickinson, 5 Johns. Ch. Rep. 440, is denied, per Kennedy J., 1 Barr 275.

STOUFFER v. COLEMAN, 1 Yeates 393.

Is not accurately reported, &c., 7 S. & R. 75.

STRATFORD v. BOSWORTH, 2 Ves. & B. 341.

See Fowle v. Freeman, *ante*.

STRANGFORD v. GREEN, 2 Mod. 227.

Besides the particular features of this case, which is not well reported, it is to be observed, that it was at an era when commercial law was but little understood in England, &c., per Duncan J., 12 S. & R. 250-1.

STREET v. HOPKINSON, 2 Stra. 1055.

That the K. B. has not power to award a *venire de novo*, in a writ of error to C. B., not law, see 2 Stra. 1053 and 1 Watts 490.

STRETTON'S CASE, 1 Ves. jr. 266.

Is an imperfect and unsatisfactory note, but is authority, 14 Johns. Cha. Rep. 544.

STRICKLER v. TOD, 10 S. & R. 69.

Opinion of Duncan J. S. P. as in Blk. Com. 403, *ante*.

STRIKER v. MOTT, 6 Wend. 465.

Explained, 6 Hill (N. Y.) Rep. 342.

STROUD v. LADY GERRARD, 1 Salk. 8.

That facts, &c., must be pleaded according to the operation things have in law, not so strictly enforced here, &c., see 2 Whart. 260.

STUBBS v. LUND, 7 Mass. 453.

The opinion of Parker C. J. dissented from by Rogers J., 1 Rawle 22.

STYMETS v. BROOK, 10 Wend. 206.

May be in accordance with the statute law in that state, but it is opposed to the English law, &c., see 4 Watts 283, 374; see Brown v. McCulloch, *ante*.

SUGDEN VEND. 487.

That notice alone before the execution of the deed and payment of the whole purchase money, will defeat the estate of the purchaser, &c., denied, per Tilghman C. J., 3 S. & R. 434.

SUGDEN'S POWERS.

"In many respects excellent," per Id. Eldon, 17 Ves. jr. 393

"Book of great authority," per Park, 2 Brod. & Bingh. 535; 3 Johns. Cha. Rep. 531.

SUGDEN'S VEND. AND PURCH.

"Excellent work," per Id. Eldon, 18 Ves. jr. 96.

SUTTON AND COLDFIELD v. WILSON, 1 Vern. 254.

Overruled, *semble* 19 Ves. jr. 434.

SUTTON v. NELSON, 10 S. & R. 238.

The word "filing" was carelessly used for *delivering*, on a supposition that the one would follow the other as a matter of course, *per cur.* 1 Watts 42; 9 Bing. 46.

SWANNOCK v. LYFFORD, Amb. 6.

Reported by mistake under name of Hill v. Addams, 2 Atk. 208-9; 2 P. Wms. 707, n.

SWEARINGEN v. PENDLETON, 4 S. & R. 389.

The principle of that case explained, 3 Penn. Rep. 189.

SWIFT v. TYSON, 16 Peters Rep. 1.

So far as it conflicts with Coddington v. Bay, 20 Johns. Rep. 637, disapproved, 6 Hill (N. Y.) Rep. 93.

SYLER v. ECKART, 1 Binn. 378.

Explained in 3 Penn. Rep. 362, per Kennedy J.

SYMANER v. TATTAM, 1 Atk. 613.

The doctrine is too generally stated, 16 Ves. jr. 306.

TARDYFF v. SCHINGHAN, 1 Bro. C. C. 423.

Overruled, 3 Sim. 501, *et seq.*

TARGET v. GAUNT, 1 P. Wms. 433.

The distinction in that case, between a devise which would create an estate tail in lands and not in chattels, has been since exploded, &c.; see remarks of Gibson C. J., 17 S. & R. 294-5.

TATLOCK v. HARRIS, 3 Term Rep. 172.

S. P. as in Cruger v. Armstrong, *ante*.

TAYLOR v. MILNOR, 10 Ves. jr. 444.

Goes too far, as stated in the report, 16 Ves. jr. 355.

TAYLOR v. OKIE, 13 Ves. 180.

Denied, per Rogers J., 3 Whart. 279.

TERMS DE LA LEY.

Book of great antiquity and accuracy, 7 Dowl. & Ryl. 796.

THACKARA v. CURREN, 2 P. A. Browne 246.

Disapproved of in 15 S. & R. 83.

THELLUSSON v. WOODFORD, 13 Ves. 209.

Denied, per Kennedy J., 1 Whart. 504-8.

THEOBALD ON PRIN. AND SURETY, p. 259.

That sureties are entitled to stand in the place of the creditor, and to have the same remedies as he would have had *only* in respect of collateral securities, &c., denied, per Gibson C. J., 9 Watts 455.

THOMAS v. CROSWELL, 7 Johns. Rep. 264.

Disapproved, 6 Hill (N. Y.) Rep. 518.

THOMAS v. PLEDWELL, 2 Eq. Ca. Abr. 599, pl. 25; 7 Vin. 53, pl. 5.

Seems to be inaccurate, see 16 Ves. jr. 425 *et seq.*, in arg. of counsel.

THOMAS v. THOMAS, 6 T. R. 671.

As to excluding evidence of professions, previous to the execution of a will, indicative of an intention to give the property in a particular way, questioned, 3 Watts 392.

THOMPSON v. DOUGHERTY, 12 S. & R. 448.

Unsustainable by principle or authority, 2 Whart. 246.

THOMPSON v. LEACH, 2 Ventris 198.

The majority of the judges in that case were wrong, and J. Ventris who dissented, right, *Towson v. Tickell*, 2 Barn. & Ald. 31.

THOMPSON v. PHILLIPS, 1 Bald. 72.

That when the acknowledgment of a sheriff's deed is once taken, *every thing* which has been done, is considered as done by the previous order or subsequent sanction of the court, and cannot be disaffirmed collaterally, &c., denied, per Huston J., 2 Watts & Serg. 288; and see 1 Watts & Serg. 519.

There is another point in *Thompson v. Phillips*, which I totally deny, viz. that a sheriff's sale will pass any title, where (there is) no *fi. fa.*, or where a *fi. fa.* is levied after the return day, inquisition, and condemnation, without a previous levy on a writ which has been served, per Huston J., do.

THOMPSON v. STANHOPE, Amb. 737.

It does not appear by the Reg. book that an injunction was granted, 1 Ves. & Beam. 21.

THORNBURY v. DEW, *vide* 2 Brown Ch. Rep. 383.

The opinion of Willes C. J. denied, in 1 Yeates 228.

THOROUGHGOOD'S CASE, Noy 73.

A. having a judgment in debt and an execution against B., who died, sheriff levied the money upon the executors of B., held by the court to be "*nought*." In Dyer's Rep. 76, *c.*, the editor substitutes "*void*" for "*nought*," said to be unwarranted, and the whole decision long since overruled, per Kennedy J., 4 Watts 375, 282.

THURSTON v. SLATFORD, 1 Lutw. 377.

Reported contra, 1 Salk. 234. The case is not satisfactory either way, &c., per Duncan J., 7 S. & R. 393.

TILLIER v. WHITEHEAD, 1 Dallas 269.

Questioned, 8 Watts & Serg. 65.

TOLLER ON EX. 484. S. P. as Saddler v. Hobbs, *ante*.

TOWNSEND v. WILSON, 1 Barn. & Ald. 608.

Ld. Eldon said he did not agree to that case, Jacobs Rep. 193.

TRACY v. HARKINS, 1 Binn. 395, in court of com. pleas.

The reasons given for that decision by no means satisfy this court, 7 S. & R. 227.

TRACY v. WICOFF, 1 Dallas 124.

Is as unfounded in principle as in authority, and has been directly overruled, &c., *per cur.* 8 Watts & Serg. 18.

TRAFFORD v. TRAFFORD, 3 Atk. 347.

The report incorrect, and case overruled, 12 Ves. 232, per ld. Eldon.

TRIMBLE v. THORNE, 16 Johns. Rep. 152.

"Stands alone and unsupported," 7 Conn. 528.

TROUGHTON v. GITLEY, Amb. 630.

Is attended with difficulty, 16 Ves. jr. 238.

TRUNDELL v. TROWELL, Sty. 273; Gilb. 188, 8d ed.

Overruled, see 3 Saund. 209, *c.*, *n.* (1).

TURNER v. DOUBLEDAY, 6 Madd. Rep. 94.

Not correct, 1 S. & Stew. 315.

ULRICH v. VONEIDA, 1 Penn. Rep. 250.

That on a plea of *nul tiel record*, a terre tenant brought in on a

sci. fa. may show the original judgment was entered without authority, &c., overruled in 5 Watts & Serg. 474; 8 do. 387.

THE UNITED STATES (in Error) v. COOK, 2 Mason 22.

That a writ of error will not lie to the judgment of the court on a plea of *nul tiel record*, denied, per Rogers J., 6 Whart. 350.

THE UNITED STATES v. PARKER, 2 Dall. 378.

Dictum of Iredell J., as to an *alias capias* being a discontinuance, denied, per Sergeant J., 6 Watts 529.

UTRECHT v. MELCHOR, 1 Dallas 428.

Not accurately reported, 3 Yeates—was determined on the ground of fraud, and has been much doubted in supreme court of New York, 1 S. & R. 51.

VANBENJHOOVEN v. LAWSON, 6 Johns. Cha. Rep. 319.

The remark 4 Rand. Rep. 409, is not correct; the chancellor refers to Saunders' ed. of Atkyns.

VANDERHEYDEN v. YOUNG, 11 Johns. 160.

That the plea of guilty will in every case preclude a defendant from afterwards disputing the jurisdiction, denied, per Gibson C. J., 3 S. & R. 190.

VANHORNE'S LESSEE v. DORRANCE, C.C. U.S., 2 Dallas 304.

"Of which I shall only say at present, that it is not easy to determine whether the misapprehension of the facts in the cause, or the misapplication of the law to those facts is most conspicuous," by Huston J., 16 S. & R. 173; and see 3 Watts 295.

VASSE v. SMITH, 6 Cranch 226. Denied, 6 Watts 12.

VASTINE v. FURY, 2 S. & R. 426. Oppo. Negley v. Stewart, *ante*.

VERE v. LEWIS, 3 T. R. 184.

S. P. as in Cruger v. Armstrong, *ante*.

VERNON.

Mr. Raithby's edition "very valuable," *Id.* Eldon, 16 Ves. jr. 2, and the 2d vol. is a book of no credit or estimation, Beames on Power to Deprive Father of his Children, p. 7.

VERNON'S REPORTS.

Were edited by P. Williams and Mr. Melmoth, and they were probably the authors of the marginal notes, per Parke J., 3 Moore Rep. 702; "Not a very exact reporter," per Willes, 2 Ves. 610.

VINER.

Is the most accurate of abridgers, per Tilghman C. J., 12 S. & R. 274.

9 VINER ABR., Error K. pl. 39.

"Trespass v. two; they may join in error, or sever at election;" if intended to say that each may prosecute his writ of error separately, it cannot be law, &c., 6 S. & R. 321.

VOOGHT v. WINCH, 2 B. & Ald. 662.

Dictum therein not law, 4 Gill & J. 356.

WADSWORTH v. GYE, 1 Sid. 216.

Has been constantly cited as an authority, directly contrary to what on inspection it appears to be—*quare* if it is law, 4 S. & R. 110. -

WAKELY v. HART ET AL., 6 Binn. 37.

Principle of explained, 6 S. & R. 418.

WALKER v. HULL, 1 Lev. 177.

This case has been given up, and denied to be law in *Baxter v. Burfield*, 2 Stra. 1266; Tilghman C. J., 4 S. & R. 110-11.

WALKER v. JACKSON, 2 Atk. 624.

Overruled, *semble* *Coote Mortg.* 463-4.

WALKER v. REEVES, Doug. 461, n.

Impeached by *Turner v. Richardson*, 7 East 335; 3 Moore Rep. 511.

WALKER'S ADM'RS. v. SMITH, 3 Yeates 480.

Overruled, 7 S. & R. 400.

WALLACE v. KING, 1 Hen. Blk. 13.

In computing the time given to replevy goods distrained, the day of the distress held to be the first of the five, denied in 6 Watts 37.

WALLACE'S ADM'R. v. COOK, 5 Esp. 117.

Dissented from, per Rogers J., 4 Watts & Serg. 286.

WALLIS v. RIPON, Amb. 183.

Seems to have been overruled in *Cowp.* 141; see 1 Watts 438.

WALN v. HUGHES, 5 S. & R. 470.

Corrected per Gibson C. J., 12 S. & R. 447.

WALTON v. HANDBURY ET AL., 2 Vern. 592.

"Is so imperfectly stated, that it is impossible to get at the principle of the judgment," per Best C. J., 4 Bing. 66-7.

WALPOLE v. LD. CONWAY, Barnad. Ch. Rep. 153.

Overruled by Cunningham v. Moody, 1 Ves. 174, and Doe v. Martin, 4 T. R. 39; Cornish on Uses, p. 50.

WALTON v. WILLIS, 1 Dallas 265.

Dictum of M'Kean C. J., that a recognizance is a lien on lands &c., denied, &c., 16 S. & R. 16.

WALWYNN v. COUTTS, 3 Meriv. 707.

Correctness of that report frequently questioned, 3 Sim. Rep. 1, n.

WARREN v. WARREN, 1 Bro. C. C. 305.

Very obscurely reported, 18 Ves. jr. 493-4.

WARREN v. WINDLE, 3 East 211.

The opinion of Id. Ellenborough as to the *repeal* of a repealing act, and the *expiration* of it, denied per Gibson C. J., 6 Whart. 297.

WARTER v. HUTCHINSON, 1 Bar. & Cres. 721, *as above*.

WARTER v. WARTER, 2 Brod. & Bing. 349.

Doubted, Cornish on Uses, p. 60-1.

WASHBURN'S CASE, 4 Johns. Ch. Rep. 106.

Denied in 10 S. & R. 133-4.

WATKINSON v. BERNARDISTON, 2 P. Wms. 367.

Commented on and *semble* overruled, 8 S. & R. 122; 12 Wheat. 626.

WATSON v. DAVIS, 19 Wend. 371.

Commented on and explained, 6 Hill (N. Y.) Rep. 38.

WATSON v. KING, 4 Camp. 272. Denied, 4 Watts & Serg. 285.

WATSON AND PAUL v. THE INS. CO. OF N. AM., 1 Binn. 47.

"There are weighty objections to the principle adopted by the court in that case," per Tilghman C. J., 4 Binn. 464.

WATT v. GROVE. S. P. as Clarkson v. Hanway, *ante*.

WAYNHAM v. BEND, 1 Campb. Rep. 175.

Overruled, 12 Johns. 90; 5 Conn. Rep. 75.

WEBBER v. SHEARMAN, 6 Hill 20.

Commented on and limited, 6 Hill (N. Y.) Rep. 497.

WELDRAKE v. HULTON, 3 Anstr. 633.

There is some error in the report, Beam. Pl. Eq. 41, n. 2.

WELLINGTON v. M'INTOSH, 2 Atk. 570.

Misreported, Gow Partner. 126, n. n.

WELLS v. SLADE, 6 Ves. 498.

Dictum of ld. Eldon denied, per Gibson C. J., 2 Wh. 449.

WENTZ v. DEHAVEN, 1 S. & R. 312.

Said on the authority of ld. Mansfield's dictum in *Martin v. Moulin*, 2 Burr. 979, that a parol gift or relinquishment of a mortgage debt, will release the mortgage itself without regard to the question of consideration or actual delivery, denied by Gibson C. J., 3 Penn. Rep. 413.

Same case, as to the distinction between a *parol* and a *written* declaration, denied in S. C.

WESTERN v. RUSSELL, 3 Ves. & B. 188.

See *Fowle v. Freeman*, *ante*.

WESTLEY v. SKINNER. See B. N. P. 68, *ante*.

WESTON v. WITHERS, 2 T. Rep. 511.

The two cases in the note doubted, 16 Ves. jr. 410 (Ingh. ed.)

WEST'S SYMBOLEOGRAPHY.

Some of the precedents in it seem to imply that an indictment will lie for civil injuries. I do not think so, per Yeates J., 5 Binn. 281; see 5 Watts & Serg. 461.

WHALE v. BOOTH, 4 T. R. 625, n. a. Goes too far, 17 Ves. jr. 54.

WHELOCK v. WHEELWRIGHT, 5 Mass. 104.

Questioned in 6 Watts 12.

WHITCOMB v. WHITING, Doug. 652.

Overruled, *semble* 5 Conn. Rep. 11.

WHITE v. ST. BARBE, 1 Ves. & Bea. 405.

S. P. as in *Burnett v. Kynaster*, *ante*.

WHITING v. BRADLEY, 2 N. Hamp. Rep. 209.

"Every thing said by the judge who delivered the opinion of the court in relation to the principle of the common law, was extra-judicial, and as it seems to me, without foundation in authority;" per Gibson C. J., 10 Watts 11, 12.

WHITMORE v. NAPIER, 4 S. & R. 290. Overruled in 1 Watts 329.

WHITNEY v. BIGLOW, 4 Pick. 110.

Overruled by *Addams v. Seitzinger*, 1 Watts & Serg. 243.

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WICKWARE v. BRYAN, 11 Wend. 585.

Commented on and reporter's abstract corrected, 6 Hill (N. Y.) Rep. 621.

WIGG v. WIGG, 1 Atk. 884.

Is badly reported &c., per Tilghman C. J., 3 S. & R. 433.

WILD v. FISHER, 4 Pick. 421. See *Cruger v. Armstrong*, *ante*.

WILKINSON v. TERRY, 1 M. & Rob. 377.

Overruled by *Taylor v. Heniker*, 4 P. & D. 242.

WILLANME v. GORGAS, 1 Camp. 217.

Questioned in part by *Kennedy J.*, 1 Watts 519.

WILLIAMS v. CALLANDER, Holt N. P. 307.

S. P. as *Leicester v. Walter*, *ante*.

WILLIAMS v. CHITTY, 3 Ves jr. 545.

Doubted, *Roper Bar. & Fem.*, vol. 1, 477, and 8 Sim. Rep. 55.

WILLIAMS v. EVERETT, 14 East 587. Doubted; see 4 B. & C. 166.

WILLIAMS v. OGLE, 2 Stra. 889.

That on *nul tiel record*, the change of a letter in a name is *not* a fatal variance, denied, per *Duncan J.*, 7 S. & R. 479.

WILLIAMS v. OWENS, 2 Ves. jr. 595.

Is in one point entirely inconsistent with *Cave v. Holford*, 3 Ves. jr. 650.

WILLING v. ROWLAND, 4 Dall. 106.

Overruled, 5 S. & R. 30-1 & 539.

WILT v. FRANKLIN, 1 Binn. 502. Explained, 5 Watts 345.

WINCHESTER, BISHOP OF, v. FOURNIER, 2 Ves. 445.

Overruled, *semble* 19 Ves. 268, *n. a.*

WITTENHALL v. WOOD, 1 Esp. 16.

S. P. as *Barjean v. Walmesly*, *ante*.

WOGLAM v. COWPERTHWAIT, 2 Dallas 68.

Commented on and explained, 6 Hill (N. Y.) Rep. 558.

WOOD v. HAYDEN, 2 Esp. 553, denied, 1 Barr 441.

WOOD v. SMITH, 4 Car. & Payne 45.

More than questionable, per *Gibson C. J.*, 9 Watts 58.

WOOD'S INSTITUTE 503, 576, 596, 600.

That the privilege of a suitor, &c. extends to *final* process, denied, 1 Yeates 25. "Wood's authority as a common law writer is inferior to Blackstone," *ib.*

WOODESON'S LECTURES, Vol. 2, p. 415.

That a fair price implies a warranty &c., denied, 1 S. & R. 50.

WOODWARD v. LARKIN, 3 Esp. Rep. 287.

Questionable, 1 Holt Shipp. 325.

WOLFLEY v. SPARKS, 2 Ves. 529. Questioned in 4 Watts 453.

WRIGHT v. NUTT, 1 H. Blk. 136.

Shaken if not overruled in 1 Anstr. 544; see it commented upon, per Gibson C. J., 1 Watts 289.

WRIGHT v. RUSSELL, 2 Blac. Rep. 934.

I am aware that the principle of this case has been questioned, and perhaps with reason, per Gibson C. J., 2 Penn. Rep. 46.

WYNNE v. COOKES, 1 Bro. C. C. 515.

Questioned, 1 Prest. on Conveyancing 22-3, *note*.

WYNNE'S EUNOMUS, dialogue 3, sect. 67, page 317.

Contradicted per Tilghman C. J., 10 S. & R. 128. Wynne does not seem to have been in all respects master of the law of nations, *ib.*

YABSLEY v. DOBLE, 1 Ld. Raym. 190.

The *reason* why admissions made by the under-sheriff are good against the sheriff, not correct, 9 S. & R. 396-7.

YARD v. ELAND, 1 Ld. Raym. 362. Explained, 3 Watts 216.

YEATES REP. (PENN.)

Contain more sound law on *general subjects of contest in this country*, than the whole *nisi prius* reports of England &c., per Huston J., 5 Watts 216, &c.

YORK v. ALLEN. See The King v. Death, *ante*.

YOUNG v. REUBEN, 1 Dallas 119.

Were the precise point in Young v. Reuben now before us, that case would not be recognised as a precedent; *per cur.* 5 Rawle 45.

YOUNG v. TAYLOR, 2 Binn. 218.

Commented on &c., 1 Penn. Rep. 278-9.

ZOUCH v. WOOSTON, 2 Burr. 1136.

Doubted, 1 Scho. & Sef. 66 to 71; 18 Ves. jr. 414-15.

IN THE COMMON PLEAS OF SUSQUEHANNA CO.

[June 1, 1846.]

COOMALT *v.* STANLEY.

1. One in possession of lands under articles of agreement, on which the purchase money is unpaid, has no right to sell the pine timber growing on the lands.
2. Replevin lies for such timber, when taken away by a third person, although a purchaser for a valuable consideration.

Replevin, brought by Caleb Coomalt against Luther Stanley, for a quantity of white pine saw-logs.

The defendant pleaded *non cessit* and property.

The cause was tried at the April term, 1845, by Messrs. *Case, Bartley & Richards* for the plaintiff, and by Messrs. *Lusk & Little* for the defendant.

The case was this.

The plaintiff being the owner of a tract of wild land situate in the township of Choconut, on the 26th day of June, 1840, by articles of agreement under seal, contracted to sell sixty acres thereof to one Patrick Doyle for \$184 40, to be paid in seven equal payments, with interest from the date, to be paid annually.

The articles of agreement contained a provision that the deed was not to be made until the whole purchase money was paid, and a farther stipulation that if the interest were not punctually paid, the contract should be void as to any right of Doyle under it, and that Coomalt might re-enter and hold the land discharged of any thing done the agreement.

Doyle went into possession, cleared some part of the land, built a log house and barn thereon, but paid no part of the purchase money or interest. In the winter of 1843, he sold all the valuable pine timber then growing on the lot, to the defendant, who owned a saw-mill in the vicinity. The defendant entered upon the land, cut down the timber trees, and hauled the logs to his mill. They were there replevied by the plaintiff. Doyle was indebted to the defendant, and sold the timber to pay his debt.

The defendant supposed that Doyle had the right to sell the timber at the time he took it.

JESSUP, president, after recapitulating the facts of the case, thus charged the jury.

This state of facts involves two questions of law to be decided by the court.

1. Had Doyle a right to sell this timber?
2. If he had not, is replevin the proper remedy?

The first is a question of great importance in its practical effects upon large districts in this state, which are new and principally uncultivated, and in which wild lands are mostly sold on a credit by articles of agreement substantially like those given in evidence in this case. The point has never been directly decided by the supreme court of this state, and it is claimed that the current of opinion at the bar has always been in favour of the right of the settler, under articles of agreement, to remove *all* timber from the land at his pleasure. That such practice has prevailed to a very considerable extent, is not doubted; and that it is the right of the settler to remove the timber from the land for agricultural purposes, for necessary fuel, for fences, and for such objects of improvement as are contemplated by the parties entering into the contract, is established both by reason and authority. This however is a different question, as in this case the timber was taken for no purpose beneficial to the land, or provided for by the contract.

The right therefore, to remove it, must be found, if it exist, in the legal consequences flowing from the proper construction of the contract between the parties. That relation, therefore, is to be ascertained from the agreement itself.

That the plaintiff holds the legal title to the land, and Doyle having failed to pay, might sustain ejectment, is entirely clear. Doyle under these articles, not having paid or in any respect performed, could not resist a recovery. Coomalt by express reservation, might re-enter at any time. The improvements made by Doyle could not operate to enlarge his equities beyond the provisions of the contract. The parties having executed their contract and particularly defined their rights, are to be bound thereby; and it was not in the power of Doyle by any act of his, to defeat the rights reserved to Coomalt under the contract. The only mode of preventing a re-entry by Coomalt, was a payment of the purchase money, as it became due. This Doyle failed to do; and thus failing, he became under the articles a tenant at will to Coomalt. Cutting the timber trees by a tenant is waste; and as soon as the trees are severed, they become at once the property of the reversioner, who may maintain trover for them, even in the hands of a bona fide purchaser.

Farrant v. Thomson, 5 B. & A. 826; 7 E. C. L. 272; *Jackson ex dem. v. Brownson*, 7 Johns. Rep. 225.

The contract in this case contains some peculiar provisions which are, it is said, unusual, and which, reserving to Coomalt the right to declare the contract void for non-payment of interest, are claimed to be penal in their nature, and such as would be relieved against in equity, in favour of a purchaser who had made valuable improvements, and therefore ought not to be operative in this case.

But equity would not relieve without payment, or offer of payment. Nor is a penalty to be relieved against, in favour of a person guilty of waste. Whatever therefore might be done by special verdict in case of ejectment by Coomalt against Doyle, it is manifest that without payment of any part of the purchase money, he ought not to rob the estate of its valuable timber, for purposes of gain to himself alone.

The case raises however the broad question, of whether a purchaser under articles of agreement, without payment of the purchase money, is entitled to remove the valuable timber trees growing on the land. A consideration of the relative situation of the vendor and vendee, as well as ample authority, answer this question in the negative. The articles of agreement are silent upon this subject. The provisions are that the title is to be conveyed on payment of the purchase money. The purpose for which the vendee takes the possession, is improvement of the lands for agriculture. It is not a vesting of title to the land in the vendee, nor giving him possession for general purposes of ownership. The title is held by the vendor as his security for the purchase money, and the vendee has a mere equity in the land of which he has the possession for a qualified purpose. To permit him at once upon entering, to strip it of its valuable timber, would be to authorize a destruction of the rights and security of the vendor, in no sense conferred by the contract, and which cannot be supposed to have been contemplated by either of the parties when entering into the contract.

It is laid down as a fundamental rule in equity, in *Sugden on Vendors*, p. 131, that if the vendee "obtain possession of the estate before he has paid the purchase money, and begin to cut timber, equity will grant an injunction against him." Why will he be enjoined? Simply because it is inequitable for him to use

the property for which he has not paid, to the injury of his vendor. *Crockford v. Alexander*, 15 Ves. jr. 138.

The principle has been fully decided in the state of New York, as appears by the case of *Moore v. Wait & Griffin*, 3 Wendell 104. That was a case of the sale of uncultivated land, under an agreement to pay the purchase money in five yearly instalments. After one instalment had become due, but was unpaid, John S. Fraser, the purchaser, sold all the pine timber to one James F. Fraser, who sold it to the defendants. No part of the purchase money had been paid. The vendor brought trover for the timber trees which had been taken off. Savage c. j. delivering the opinion of the court, says—"It is undoubtedly true that (John S.) Fraser had a right to enter and enjoy the lot he had contracted to purchase, but as was said in *Cooper v. Stower*, 'the contracts in the case must be construed reasonably and consistently with the rights of both parties,' and as cutting off the pine timber where the land was not suitable for cultivation, was not the proper and reasonable mode of enjoying the lot for agricultural purposes, Fraser had no right to cut the timber. The timber constituted the principal value of the land. The land, thus valuable, was the plaintiff's security for the purchase money; and the destruction of the timber was therefore totally unauthorized by the contract." This case settles the principle that, while the purchase money is unpaid, the purchaser, under articles of agreement, cannot deprive the property of its valuable timber. The case of *Farrant v. Thomson*, before cited, was trover for mill machinery, taken from the mill on the premises, by a tenant in possession of an unexpired term of twenty-nine years. The machinery was in the hands of a bona fide purchaser, without notice of the lease. It was held that the machinery, when wrongfully severed by the tenant from the freehold, became the property of the reversioner, and that he could sustain trover for it even against a person purchasing in market overt, or (what was equivalent to it) at sheriff's sale.

It is argued by the defendant's counsel that even if Doyle had not the right to cut and carry away timber from the land, still replevin will not lie, for that he, being in the actual possession of the land, the case of *Wright v. Guire*, 9 Watts 172, is in point, and is decisive against the plaintiff's right to recover.

The cases there referred to as settling the point that one out of possession cannot maintain trover or replevin for property taken off the land thus held, will be found to be all cases of adverse possession, and upon principle, therefore, entirely different from the present, which is a case of tenancy, and in which the possession of the tenant is the possession of his landlord.

The cases before referred to, all sustain the position that trover can be maintained, and in this state, where a broad scope is given to the action of replevin, that action may properly be sustained. There being no disputed facts in the case, it is the opinion of the court that the plaintiff is entitled to recover.

The charge was excepted to by the defendant's counsel but no writ of error taken.

IN THE COURT OF COMMON PLEAS FOR THE CITY
AND COUNTY OF PHILADELPHIA.

[Saturday, June 13, 1846.]

HALLIDAY V. MILLS.

1. A defendant who appears before a justice and confesses judgment in favour of the plaintiff, is not entitled to an appeal.
2. The transcript of a justice cannot be altered by parol evidence, except in cases of fraud.

This was a motion to strike off an appeal entered by the defendant, to June term, 1846, from the judgment of alderman John A. Elkinton.

The transcript filed stated the facts, as follows:

"April 28, 1846. Summons issued; Naylor, const.: returnable May 2, at 2 P. M. May 2, parties appear. Plff's claim is \$15, for boarding and nursing Thomas Mills. Margaret Halliday sw. Defendant confesses judgment for \$15, which is entered publicly for plff. Defendant appeals," &c.

On the 6th of June, 1846, a rule was taken to strike off the appeal. At the return of the rule, *Mr. Tarr* offered in evidence the affidavit of the defendant, to show that the alderman had committed an error, but the court refused to hear it read.

Webster, for plaintiff, contended that the 4th section of the act of 20th of March, 1810, gave an appeal only where the plaintiff's claim was disputed and the justice had rendered "judg-

ment publicly as to him of right it appeared to belong," after he had "heard and examined the proofs and allegations" of the parties. Besides that, the defendant was estopped by his confession.

A. De Kalb Tarr, for defendant, argued, that a confession of judgment was often made for the purpose of obtaining an immediate appeal: that the act of 1810 did not determine the question one way or the other; and that within the twenty days allowed for an appeal the defendant had a right to resort to that step, whether for reasons which existed at the time of his confession of judgment, or for those which might arise afterwards.

PARSONS J.: The simple question before us is this: does a party by appearing before a magistrate, and confessing a judgment in favour of the plaintiff, waive his right of appeal?

The right of all parties of taking their cases from the decision of a subordinate tribunal is given by statute; but this right or privilege, like any other, may be taken away by the agreement of the party on whom the benefit is conferred. But that can only be done either when it is effected by an express agreement in writing, or when it is made so by matter of record. See *Dawson v. Condry*, 7 S. & R. 367. If therefore a defendant appears before a magistrate and voluntarily confesses a judgment, and this confession is entered of record by the justice, it is in effect an agreement of record to waive his right of appeal. For on what ground can he ask to have this court to entertain his appeal, and try the validity of a debt or the question of his indebtedness, when he has acknowledged that the sum is justly due?

It has been decided by the supreme court, that when one in a promissory note waives the right of appeal in such an instrument, he is bound by it, and after judgment is rendered against him by a justice of the peace, no appeal will be sustained; and such was the case of *Pritchard v. Denton*, 8 Watts 371.

The reasoning of judge Sergeant in the opinion delivered in that case, seems to decide the principle involved in the present. Because if a party can waive this privilege by an agreement in writing, most undoubtedly he can by matter of record. And it seems to be the opinion of the court in *Dawson v. Condry*, if the agreement is made a part of the record before a justice it will bind him. Now in the opinion of the court, when one appears

and confesses a judgment, which confession is entered of record in his presence by his consent, it is an agreement to waive his privilege and abandon his right of appeal, and having thus deliberately done it, he is bound by an act so solemn which he has caused to be entered of record.

It is alleged by the counsel for the defendant, that this confession was never made, and he seeks to contradict it in part by depositions; but we are of the opinion that a record cannot be controverted by parol evidence. The record of a court cannot be falsified by merely parol proof, unless the entry was fraudulently made. If the magistrate has made a false entry—one in opposition to the facts—the party has his remedy by action. probably that officer can be held responsible before a criminal court. But we must take his record as true: and if it is, then in our opinion the act of confessing a judgment is an agreement to waive his appeal. Such also seems to be the view taken by the legislature, when by the act of 1833 they have provided, that if a defendant appears and confesses a judgment, and the plaintiff appeals and does not recover a greater sum than the party offers to confess judgment for, he shall pay all the costs which accrue on the appeal. If therefore it should be decided, that he could appear and confess a judgment for what he thought was due, and still have the right of appeal after the plaintiff had acquiesced in the confession, and was not disposed to pursue his claim for a greater amount, we might thereby put it in the power of an artful defendant to entrap his adversary by such confession if the appeal should afterwards be recognised. The court are of the opinion, that upon principle as well as authority, this appeal should be dismissed.

Let the rule be made absolute.

Judges KING and CAMPBELL concurred.

BIDDLE *v.* BLACKBURN.

1. A tax collector may levy on personal property of a tenant on the premises, after the taxes have been *registered* and after a *judicial sale* of the property, and the tenant paying such tax may defalk the same from the rent, or recover it against the landlord.
2. Registering the tax does not divest the right of the tax collector to levy for the same; his remedies are cumulative.

PARSONS J.:

This cause comes before us on a case stated, which is as follows: "A property consisting of eight houses in the Third Ward Spring Garden adjoining each other, formerly owned by H. J. Miller, was assessed in the name of his partner Shotwell, at the usual period in 1841. It was sold by the plaintiff in the month of October, 1841, in eight distinct lots, for a sum more than sufficient to pay all the costs and charges and expenses attending the sale, and the taxes in question; and was purchased by the plaintiff, whose separate deeds for the eight houses were all acknowledged on the 21st day of October, 1841.

"The tenants who remained became the tenants of the purchaser, and have leased from him; some of the houses have in them new tenants, who took possession since the sale. The tax collector called upon one of the tenants (not one of the new tenants), and demanded from him the taxes for the whole eight houses; the tenant declined paying them, and the collector made a levy on the goods in that one house, and threatened a sale. The taxes were then paid him under this threat. If the tax collector was entitled to distrain for the taxes, or if they were a lien on the land, the judgment must be for the defendant; if not, then for plaintiff."

That the sale by the sheriff of real estate discharges all liens (except a prior mortgage, as provided by the act of assembly of 1830), taxes as well as others, is a question too well settled in Pennsylvania to require remark or the citation of cases; hence the only question which arises for decision is, whether the collector had a right under the facts disclosed to distrain the property on the assessed premises, for taxes due before and at the time of the sheriff's sale. The solution of this proposition depends upon a correct application of the provisions of the act of assembly of the 3d of February, 1824, relative to the collection of taxes in the city and county of Philadelphia.

The 1st section of this act provides, that all taxes and levies which are lawfully imposed or assessed, to be applied for any purpose in the said city and county, shall be a lien on the real estate upon which they are assessed, and shall have a priority to, and be fully paid before any recognizance, mortgage, judgment, debt, obligation, or responsibility, with which said real estate may become liable to after the passage of this act. Other sections of the law make provision in the first place, for the manner in which the taxes thus assessed shall be collected if practicable, and then provides in default of payment by a specified time for their registry in the county commissioners' office, and authorizes the county commissioners to give copies of such registry, &c.

Then comes the 6th section, which provides that all collectors or agents, empowered or authorized to collect and receive the taxes, rates, or levies due and unpaid on any real estate, which may be hereafter imposed and assessed, *and which shall have been registered according to the provisions of this act*, shall be and they are hereby authorized and empowered *at any time*, when the same may be found on the estate on which such taxes, rates, and levies may be due, to levy upon any goods, chattels, or personal property which may be found thereon, and to sell the same, &c. Then it is in the act said, "*And it is hereby enacted and declared*, that it shall be lawful for any person or persons whose goods and chattels or personal property may be levied upon and sold under the authority of this law, for taxes, rates, or levies, or who pay the said taxes, rates, or levies, by action of debt or otherwise, to recover the amount so paid, &c., together with the costs and damages against the owner or owners of such real estate, or if a tenant, to defalcate the same out of the rent which may be due the owner."

From the reading of the 1st section of this act, it is manifest that when the property was sold by the sheriff, the collector could have demanded from the sheriff the amount of the taxes out of the proceeds of the sale by that officer, and he would have been bound to pay them, or the court in their decree would have set apart a sum sufficient for that purpose, if a distribution of the proceeds had been made by them.

The taxes are a lien on the real estate from the time of the

assessment. This point seems to be clearly settled in Parker's appeal, 8 Watts & Serg. 449.

But was this the only remedy for the collector? Did his failing to demand the amount from the sheriff or out of the proceeds of the sale, deprive him of all other means? I think it does not. The whole act must have a reasonable construction; and if we give full effect to the 6th section, then the collector had an undoubted right to levy on the personal property of the owner, or tenant under him, which was upon the premises. This section expressly gives him this authority, notwithstanding the registry of the taxes. The language of the law is clear and explicit on this point, and seems to me to be designed to meet all such cases. Suppose the owner of land six months after the tax has been assessed should sell the premises in the possession of a tenant, the taxes still remaining unpaid, would any one contend seriously that the collector could not seize personal property thereon to pay and satisfy the taxes, although they had been registered? I think not. And for most purposes, private and judicial sales are placed upon the same footing. True it is, that in judicial sales the liens of judgments and others of a similar character are discharged from the land in the hands of the purchaser; but may not the holder of a judgment resort to the personal effects of the original debtor, if his judgment is not paid out of the proceeds of sale? It seems to me no one can doubt it. If authority is wanted to sustain this view, the case of *Duncan v. Harris*, 17 S. & R. 436, is conclusive upon the subject. As between third persons a lien may be extinguished and a judgment satisfied, but between creditor and debtor, the neglect to enforce a lien, or execute a seizure of personal property by a sale, does not always extinguish the debt between them. And such is the decision of the supreme court in Parker's appeal, above cited. In that case, the collector had seized personal property sufficient to pay the tax, and he abandoned the levy; and yet it was held he might come in and claim the tax from the proceeds of the sale of the real estate.

If this principle is sound, and I think it cannot be very well questioned, that adjudication would seem to be decisive of the question before us. For this rule I think is fairly deduced from it, that the collector has two remedies. He may either resort to the personal property of the owner, or that which is on the

premises at any time during the continuance of his warrant; or if the property is sold by the officer of the law, he can demand the amount out of the proceeds of sale. It is therefore clear, both remedies are given by the act of the 3d of February, 1824, and the collector may resort to either or both. Suppose real estate is sold by the sheriff, and it does not bring sufficient to pay the costs and taxes, must the balance be lost? Could not the collector levy upon the personal property of the debtor to pay the residue? I think clearly he could. If, then, these principles are correct, it necessarily follows that the omission of the collector to demand the tax in this case out of the proceeds of sale, does not prevent a resort to the personal property on the premises liable to a seizure.

If there is any question about the construction of this act of assembly, there is another principle which might be invoked, which it appears to me is equally conclusive against the plaintiff on the facts presented in this case. This demand was for the tax of 1841. Now according to the usual mode of assessing taxes, it must have been assessed in the fall of 1840 and winter of 1841: the appeals from assessment would have been held in the spring of 1841; consequently when this property was sold the tax was fairly due from the owner, and he was bound to pay it. In the case of *Shaw v. Quinn*, 12 S. & R. 299, it is decided, that the person charged at the beginning of the year is liable for the taxes of the whole year, though he alien before the day of appeal. No one on this authority can doubt, but that the owners were liable for this tax of 1841 after the sale by the sheriff, and his property could be levied upon; and the act of the 3d of February, 1824; gives the collector the same right to levy the property of the tenant that it does of the landlord, and provides a remedy for him who is compelled to pay against the owner. Now the tenant who was in the possession at the time of the sale had his property seized for a tax then due, and he paid it to prevent a sale of the same. His remedy, if any he has, is against the owner, and not against the collector, who had an undoubted legal claim against the owner notwithstanding the sale by the sheriff. For if he paid the taxes which were due when the property was sold, that does not absolve the original owner from his obligation created when the property was assessed. Hence we are told by the court in *Shaw v.*

Quinn, that "the persons charged in the duplicate are personally liable for the taxes;" and then they say, "in short, the collector can look to no other person." We say in construing the statute above referred to, the collector can look to the land, or the person or personal property of the owner, and that upon the premises; and having done so in the present case, he has not transcended the authority given him by law. And therefore we order a judgment to be rendered in favour of the defendant on the case stated.

Williams for plaintiff. *Dallas* for defendant.

IN THE COMMON PLEAS OF CHESTER COUNTY.

[September, 1845.

FRITZ V. THOMPSON.

1. A plea in abatement comes too late after a general imparlance, and when so put in may be properly set aside, or treated as a nullity.
2. An actual prayer to be allowed a general imparlance is not now necessary. But a special imparlance, reserving the right to plead a dilatory plea, though grantable by the prothonotary, must be entered of record; and if the defendant plead without such entry, the imparlance is taken to be general, and the plea must be in bar.
3. It is not easy to say *when*, under our practice, a special imparlance must be entered, and a plea in abatement put in; but when the plaintiff filed his narr. on the 31st of February, and on the 7th of the next April entered a rule to plead in three months or judgment, held, that a plea of the plaintiff's infancy in abatement, filed on the 9th of the succeeding July, and after a term had intervened, was too late, and it was stricken off on motion.
4. *Quære*, whether a plea in abatement is receivable after the running of the term, immediately subsequent to that at which the narr. is filed?

This was an action of replevin, in which the plaintiff appeared by attorney. After a compulsory arbitration and award for the defendant, from which the plaintiff appealed, he in February term, 1845, filed his narr.: and on the 7th of April, 1845, entered a rule to plead in three months or judgment. The next term of the court commenced on the first Monday of May, and continued for two weeks. On the 9th of July, the defendant pleaded the infancy of the plaintiff in abatement; whereupon the plaintiff obtained a rule to show cause why the plea should not be stricken off.

Darlington argued in support of the rule. *Lewis*, contra.

BELL, president, delivered the opinion of the court, as follows:

In this case, the declaration was filed in February term, 1845, and the plea in abatement put in after the succeeding May term, to wit, on the 9th of July, 1845, and after proceedings under a rule for arbitration entered by the defendant, which eventuated in an award for a certain sum in his favour, and from which the plaintiff appealed. Without inquiring into the effect of a trial upon the merits, in which both parties participated before the arbitrators, but which I am strongly inclined to think amounted to an admission by the defendant that the plaintiff was properly in court (*vide* Schermerhorn *v.* Jenkins, 7 John. Rep. 373; per Duncan j., in Ranck *v.* Becker, 12 S. & R. 418), let us see whether the plea in abatement is in time.

Dilatory pleas are always viewed with disfavour, and never encouraged. The courts hold a strict hand over them, and will not suffer a departure from the usual forms and times of pleading in such cases. (Neiman *v.* Schlatter, 15 S. & R. 152.) They are too late after the period allowed for a general imparlance, and may be properly set aside or treated as a nullity when so put in. (Ralph *v.* Brown, 3 W. & S. 398; Coates et al. *v.* M'Cann, 2 Bro. R. 173.) Now a general imparlance is usually from term to term. (Stevens on Pl. 30, *et seq.*) Formerly it was necessary for the defendant to pray the court to grant an imparlance, and when this was done generally and without reservation, it precluded him from subsequently pleading in abatement. But now where an imparlance is grantable, as of course it is in all cases, and a general imparlance will answer the end of the party, no actual prayer is made to be allowed it, nor is any notice taken of it on the record or in the pleadings; but the law and practice on the subject of general imparlance, with this exception, remains as before. (*Id.* 91-2-3.) But a *special* imparlance, reserving the right to plead a dilatory plea, though grantable by the prothonotary, must still be entered of record, and if a defendant plead without such entry, and especially if a term have elapsed since declaration filed, the imparlance is held to be general and the plea must be in *bar*. It is said that in England, both in the king's bench and common pleas, the practice is to state the special imparlance on the plea, and this is necessary as well to prevent a discontinuance,

as to show the defendant's right to plead in abatement. (2 Saund. 1, n. 2.) In accordance with this rule, it was held in *Doughty v. Lascelles*, 4 T. R. 520, that a plea of *misnomer* in abatement, though put in within the time allowed by the notice, was bad, because there was no special imparlance stated upon the record; and in *Blackmore v. Fleming*, where the defendant pleaded in abatement within the four days allowed, but as of a term subsequent to the declaration, a judgment signed as for want of a plea was sustained, because a defendant cannot plead in abatement in the next term, without a special imparlance. (7 T. R. 447, n. d.) The same rule obtains in the courts of Pennsylvania. In *Coates et al. v. M'Cann*, *supra*, decided by the district court of the city of Philadelphia, judge Hemphill, after stating the rule, says: "We know of no practice changing the rule, nor do we see any good reason why it should be changed. The doctrine of imparlance has been recognised in this state." And this case is cited with approbation by Rogers j., in delivering the opinion of the court in *Chamberlain v. Hite*, 5 W. 374, adjudged in 1836, who says: "A plea in abatement cannot be put in after a general imparlance; and if the defendant wish to preserve his right to such a plea, he must vary his form of prayer, by making it with the reservation of his right, and asking a special imparlance, *which must be entered on the record.*" When the prayer for special imparlance must be entered and plea in abatement put in, is perhaps not so clear. C. J. Gibson, in *Stover v. Gloninger*, 6 S. & R. 69, says it ought to be put in within four days after the declaration has been delivered; and Rogers j., in *Chamberlain v. Hite*, observes: "Dilatory pleas are not favoured, and must therefore be pleaded in a preliminary stage of the suit, unless under special circumstances of which the court will judge." But without undertaking to determine the precise time when, under our system, a special imparlance must be prayed and plea in abatement pleaded, it is sufficient for the purposes of this motion to say, that in this case no special imparlance was asked for at any time before plea pleaded, and consequently under the authorities cited the abatement came too late. For all the purposes of pleading, the time here elapsed subsequent to the declaration filed, must now be taken as a general imparlance,

after which, as we have seen, the defendant is to be confined to his plea in bar. But if this were not so, it may well be doubted whether a plea in abatement is receivable after the running of the term immediately subsequent to that at which the narr. is filed, though there be no notice of a rule to plead. It seems to me that a defendant who intends to interpose a dilatory plea is bound to watch the record, at least from term to term, in order to save to himself every advantage: but upon this point I do not intend a binding opinion.

There is nothing in the written rules of this court relating to pleading, which operates to prevent the application of the common law rule I have stated. Those obviously have reference solely to pleas in bar, and are not intended to regulate the time or manner of pleading dilatory pleas. This has been more than once decided. *Rule absolute.*

IN THE QUARTER SESSIONS OF CHESTER COUNTY.

COMMONWEALTH v. BEERBROWER.

1. An indictment framed upon the 23d section of the act of the 20th of March, 1810, against a justice of the peace, for refusing on demand, to make out and deliver to a party in an action pending before him, a certified copy of his proceedings at large, must aver a tender or payment of the fee to which the justice is entitled for such service, by the provisions of the fee bill.
2. An averment that the demandant paid to the justice the full amount of money which the justice required, for the copy of his proceedings at large, is insufficient, and after conviction upon such an indictment, judgment will be arrested.
3. Nor will proof, upon the trial, that the demandant paid the precise sum fixed by the fee bill, cure the defect.

The defendant, who was a justice of peace, was indicted and convicted under the 23d section of the act of 20th of March, 1810, for refusing, on demand made by the defendant against whom he had rendered judgment in an action pending before him, a copy, duly certified, of his proceedings, at large, in such action. The indictment, after setting out the demand, averred "that the said D. D. (the defendant in the action) then and there paid him, the said Beerbrower, *the full amount of money which he the said Beerbrower required for the said copy of his proceedings at large, so as aforesaid demanded.*" On the trial it was proved that the precise sum ascertained by the fee bill,

for such service, was paid to the justice at the time of the demand. The defendant having been convicted, he moved in arrest of judgment for the following, among other reasons, viz.: The indictment does not lay the offence with sufficient certainty, nor does it aver a tender of the legal fees on demand made for the copy.

Pennepacker, for the defendant.

Hemphill, deputy attorney-general, for the commonwealth.

The following is the opinion of the court, delivered by

BELL, president.

The defendant is indicted and convicted under the 23d section of the act of the 20th March, 1810, for refusing to deliver to a party in an action, instituted before him, after demand made, a certified copy at large of his proceedings in the suit. This proceeding against him is as for a criminal offence committed. But it is decided, by the supreme court of this commonwealth, in the cases of *Wilson v. Commonwealth*, 10 S. & R. 373, and *Baily v. The Same*, 5 R. 59, that no offence against the statute is committed by a simple refusal to deliver such certified copy, unless the demand of it by the party, be accompanied or preceded by a tender or payment of the legal fee to which the justice is entitled for such service; that is, of the fee fixed and ascertained by the existing fee bill. This is an indispensable ingredient, without the presence of which the offence has no existence. In the language of Mr. J. Duncan; "the view of the legislature was, that where it was the duty of the justice to make out copies on demand, and he refused, that refusal only rendered him criminal *where the party puts himself in a state to demand the copy by an offer of the fee.*" Now it is an unbending rule in criminal pleading, that where the act itself is not necessarily unlawful, but becomes so by particular circumstances and relations, there all the matters in which the illegality consists, must be set out in the indictment (1 Ch. Cr. L. 227-8).

It is objected against the present indictment, that it does not set out payment or tender by the prosecutor, of the legal fee to which the justice was entitled, before or at the time the demand of a copy was made, without which, as has been shown, no criminal offence was committed. That this is necessary, is con-

clusively established by the cases already cited. But it is said this indictment contains an equivalent averment, to wit, that at the time of the demand made, the prosecutor "then and there paid him, the said Jonn Beerbrower, the full amount of money which he the said John Beerbrower required for the said copy of his proceedings at large, so as aforesaid demanded;" and it is argued, with some force, that if the defendant was then content to receive the sum paid, as the full measure of his compensation, it does not after conviction, lie in his mouth to object that the precise and legal sum is not stated. But we must recollect that no agreement of the party charged, can make *that* crime which the law does not regard as crime. No man can be indicted upon his mere assent that less shall be regarded as constituting an offence in his particular case, than is required in all similar cases. If, therefore, it were stated, in this indictment, that the justice had agreed to accept and the prosecutor had paid a less sum than the fee bill fixes, there would certainly be no indictable offence set out. Nor is it sufficient, to bring him within the danger of the statute, that the justice, either from ignorance, mistake or even design, required and received from the party demanding, a smaller amount than he is, by law, entitled to receive. Suppose for a moment, the averment to be, that the justice had agreed without any fee tendered or paid, to furnish a certified copy, in consequence of which the party had neglected or omitted to make the legal tender; would the subsequent refusal be an indictable offence? It can hardly, I think, be so pretended. And yet this would not present any stronger case against the idea of an indictment, than an agreement to receive, or a demand and receipt of a sum less than the legal sum. The fee bill fixes the amount absolutely, and the party can be at no loss for the sum to be tendered or paid. It is his duty, therefore, if he intends to insist upon his demand in view of the provisions of the statute and in reference to its penalties, to put his case under its protection by a strict compliance with the requirements of the law, irrespective of the blunders or sinister designs of the magistrate. He must take care that all has been done on his part which the law contemplates to be done, before he can claim that the justice is in any default. Even in civil actions this is the rule; *a fortiori*, it is so in criminal proceedings of a highly penal nature, such as this is. It is

true that in this case, on the trial, payment of the legal fee by the prosecutor was proved. But this is not enough. The question now is, is there an indictable offence stated? and not whether the evidence as delivered in the trial, would have supported such a statement. It is the right of every one charged with an offence, to have it set out in all the various circumstances which constitute it, without which he cannot be legally convicted. Now we have seen that the omission to aver any tender, is fatal to the indictment: but an insufficient and defective averment is as vicious as the total absence of one, if it does not amount to a positive assertion of an essential fact. It has been shown that the payment of less than the legal fee, though required and received by the justice in full, is insufficient; and here is no direct averment beyond this. Looking to the indictment alone, as on this motion we are bound to do, we can only conjecture that as great or a greater sum of money was demanded and received, than the fee bill fixes, but such a conjecture is not admissible in aid of a defective indictment.

For the second reason filed, therefore, the judgment must be arrested. This determination renders it unnecessary to consider the other reason in arrest of judgment, or the reasons for a new trial, which are overruled.

IN THE COMMON PLEAS OF PHILADELPHIA
COUNTY.

MOORE v. RIDEN.

1. An *attachment* to levy debts, &c., is an *execution*, and the 10th sect. of the act of 20th March, 1810, which provides that no *feri facias* shall be issued on the transcript of a justice's judgment filed in the C. P. until an execution has been issued, &c., by the justice, extends to an *attachment* to levy debts, &c., under act of 16th June, 1836, *Purd.* 415.

In this case, a transcript of a judgment before a justice had been filed in the court of common pleas, and before any certificate had been produced to the prothonotary from the justice, stating that an execution had issued to the constable, and been returned no goods, &c., the plaintiff sued out of the common pleas an *attachment*, and attached a debt due to the defendant

by the garnishee therein named; upon this, the defendant took a rule to show cause why this attachment should not be set aside.

J. F. Johnston for plaintiffs, argued that the act of 1810 (Purd. 630), only prohibited the issuing of a *fi. fa.*, which without doubt an *attachment* was not. Per King, president: But we must construe the *words* of the act according to its *reason and spirit*. "Terms of art, or *technical terms*, *must be taken* according to the acceptance of the learned in each art, trade, or science." 1 Blk. Com. 60. A *fi. fa.* is a technical term of well known signification, and if so taken does not include an attachment. "The most effectual way of discovering the true meaning of a law, when the *words* are *dubious*, is by considering the *reason and spirit* of it," &c. 1 Blk. Com. 61. But here the words *feri facias* are *not dubious*, and therefore this rule is not to be resorted to.

W. P. Foulke for defendant, was stopped by the court.

KING, president: The argument of the plaintiff's counsel is an exemplification of the maxim, *qui hæret in literâ hæret in cortice*. The obvious intention of the legislature was to prevent *any execution* from being issued out of the common pleas, until there was no personal property to be found on an execution issued by a justice, and any other construction of the act would produce great hardship, as a defendant might be burdened by the costs of the court and sheriff, although the defendant had an amount of personal property more than sufficient to have satisfied the judgment. *Attachment quashed*.

Judges CAMPBELL and PARSONS concurred.

SAME V. SAME.

1. It is error for an alderman to issue an *alias* execution on a transcript of a judgment of another alderman, if the *transcript* does not show the first to have been returned.

In this case, it also appeared that on the judgment rendered by the magistrate, an execution had issued and been duly re-

turned by the constable, and so entered on the justice's docket; after which the justice, whose term of office had in the mean time expired, gave the plaintiff a transcript, in which however by mistake he omitted to state the *return* to the execution: upon this transcript an alias execution was issued by another magistrate, and thereupon a *certiorari* issued, &c.

It was shown to the court that the first execution had actually been returned, and so entered on the docket, and that it was by mistake that the note of the return had been omitted in the transcript, and leave was also asked to have the transcript amended.

PARSONS J.: Whatever may have been the fact, the second magistrate erred in issuing an execution on a transcript, by which it did not appear that the one before issued had been returned. *Leave to amend refused, and execution set aside.*

Judges KING and CAMPBELL concurred.

HOWELL V. COZENS.

1. Where bail for stay of execution, in a suit before a justice of the peace, reside in another county or city, the *sci. fa.* against such bail must be issued by an alderman or justice having jurisdiction within the city or county where the bail himself resides.

These were two writs of *certiorari*, to remove the proceedings in the above case, one thereof directed to Richard Palmer esq., a justice of the peace for the county, and the other to John Douglass esq., one of the aldermen of the city.

The record returned by esquire Palmer showed that a *sci. fa.* against Cozens, the bail in the original action, was issued by him on the 11th, returnable on the 21st April, 1818, at 9 o'clock A. M., and was returned "*nihil.*" An *alias sci. fa.* issued on the 22d April, returnable on the 2d May, which was also returned "*nihil.*" Judgment was thereupon entered by the justice for the plaintiff, for \$ 94 20, and costs.

A transcript of the judgment of the justice, so obtained, was removed to the city, and an execution was issued upon it by alderman Douglass, without any process having been issued by him.

To the records returned, three exceptions were filed. The case was determined upon the third exception, which is as follows: "That the defendant, when he became bail in the original action, resided in the city and continued to do so, when the writs of *sci. fa.* issued against him from the office of Richard Palmer esq.—yet there was no service thereof made upon, nor attempt to serve the same, nor did the constable leave any copy of process at his dwelling, nor had the said Cozens any knowledge of the judgment entered against him on the said writ of *sci. fa.*."

The case was argued by *S. Shoemaker* for the defendant, and *Kittera* for the plaintiff.

By the court: RUSH, president. A justice of the peace having, in *civil* cases, no power or authority but what is given to him by statute, and there being no law that warrants his issuing the two writs of *sci. fa.* against the bail, dwelling in *another* county, it is the opinion of the court that the proceedings in both these cases be reversed. The correct mode is to take a transcript of the record to an alderman or justice, exercising jurisdiction *within* the city or county where the bail himself *resides*.

See law 20th March, 1810, sect. 17.

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PAMPHLET LAWS OF 1846.

The following abstract of the laws, passed at the late session of the legislature, is presented to our subscribers, in pursuance of the plan of this Journal as heretofore announced. Acts of general application are referred to only, while those of special force are given in full.

[Act of April 16, 1846, Sect. 2.]

ACTIONS. (*Amendment of record in, authorized.*) That in all actions pending, or hereafter to be brought in the several courts of this commonwealth, said courts shall have power, in any stage of the proceedings, to permit amendments of the record, when it shall appear to them, by any sufficient evidence, that a mistake has been made in the christian name or surname of any party, plaintiff, or defendant: *Provided*, That if, by such alteration or amendment, the adverse party is taken by surprise, the trial shall be continued until the next court.—page 353.

[Act of April 20, 1846.]

ACTS OF ASSEMBLY. (*Construction of.*) That the fourth section of the seventh article of the constitution of Pennsylvania, which directs that the legislature shall not invest any corporate body, or individual, with the privilege of taking private property for public uses, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken, shall be deemed to apply to all acts of assembly passed, or that may be passed, during the

present session of the legislature, as fully and effectually, as if the same were incorporated in said act.—p. 407.

[Act of April 22, 1846, Sect. 1.]

ADMINISTRATORS. (*Power of orphans' court relative thereto.*) That from and after the passing of this act, in all cases where any trustee or trustees created or vested with authority, by the last will and testament of any deceased person, or any writing, testamentary in the nature of a will, shall die, resign, or be otherwise removed from the trust, the orphans' court of the proper county shall have power and authority to appoint another trustee or trustees to supply the vacancy occasioned by such death, resignation or removal, and shall require security for the faithful performance of the trust; and the said courts are hereby invested with power to dismiss all executors, administrators or guardians of estates held by testamentary trust, in cases of waste or mismanagement, coming within the provisions of the twenty-second section of the act of twenty-ninth March, one thousand eight hundred and thirty-two, relative to orphans' courts.—p. 483.

[Act of April 21, 1846, Sects. 4, 5, & 6.]

ALDERMEN AND JUSTICES OF THE PEACE. (*Dockets of deceased.*) 4. That every person who has been, is now, or may be a justice of the peace or alderman, and who has removed or shall remove out of the district, for which he was, is, or may be commissioned, shall, upon demand made by any person, deliver or cause to be delivered his dockets, and all official records connected therewith, to the nearest justice or alderman in his said district; and if any person shall fail, for twenty days, to comply with the provisions of this section, he shall forfeit and pay one hundred dollars, to be recovered by action of debt, for the use of any person who may sue for the same; and shall further be subject to be compelled to deliver such dockets and records, by a decree and attachment against him, which may be made and issued by any court of common pleas, or by any judge thereof in vacation, on application being made therefor by any person; and said court, or any judge thereof in vacation, shall have power, in the same manner, to enforce a delivery of such dockets and records, against any person in possession of the same, and being about to remove out of the state, without

making the delivery thereof hereby required; and the same proceedings as are herein authorized may be had, to compel the delivery of all justices' dockets in the hand of any other person, who has removed or may remove, or be about to remove out of the proper district, where such dockets belong.

6. That so much of the tenth section of the act of June twenty-first, one thousand eight hundred and thirty-nine, entitled "An act providing for the election of aldermen and justices of the peace," as provides for the delivery of the dockets and papers of an alderman or justice of the peace, to his successor in office, shall be, and the same is hereby deemed and construed to extend to all cases of succession in office, whether by death, resignation, removal or otherwise; and in case of the decease of any alderman or justice of the peace, the said delivery shall be made by his legal representative, to the person who is or may be elected, and commissioned to succeed him in said ward, borough or township.—p. 433.

2. (*Additional security to be given by.*) 5. Whenever upon petition and due proof, if it shall be made to appear to the court of common pleas of the proper county, that any justice of the peace or alderman of any city or county, who has not been required to give security, has become, or is likely to become insolvent; or that any surety of any justice or alderman has removed from the state, or become insolvent, or is likely to become insolvent; and when upon the petition of any surety, of any justice or alderman, and proof as aforesaid, it shall appear such justice or alderman has become, or is likely to become insolvent, such court may require any such justice or alderman to give security, or additional security, or counter security, to indemnify the surety so petitioning against loss by reason of his suretyship, as the case may be, in the manner provided by the sixth section of the act, entitled "An act providing for the election of aldermen and justices of the peace," in such sum, and by such time as the court may think necessary and proper.—p. 434.

[Act of March 9, 1846.]

3. (*Division of townships, &c.*) That in all cases of the creation of any new township, borough or ward, in any city or

county of this commonwealth, the commissions of justices of the peace and aldermen, within the respective territories out of which such township, borough or ward, has been or may be created, shall continue for the proper township, borough or ward, in which such justices or aldermen may respectively reside for the balance of the official term; and any deficiency in the proper number of aldermen or justices of the peace within the territories of either of such new divisions, according to the number allowed to each township, borough and ward, by the act of the twenty-first day of June, one thousand eight hundred and thirty-nine, shall be supplied at the next succeeding elections for constables in the said township, boroughs and wards.—p. 105.

[Act of April 13, 1846.]

APPEAL. (*From award of arbitrators.*) That in all cases wherein an appeal has been made from the award of arbitrators, since the passage of the act, entitled "An act concerning bail and attachments, passed the twentieth day of March, one thousand eight hundred and forty-five, and the party appellant has omitted the payment of the costs accrued, to the time of such appeal, but has given the security required by said act, for the payment of the costs, such appeal shall be held good and valid in law, notwithstanding the non-payment of the costs as aforesaid: Provided, however, That the opposite party may require the payment of such costs from such appellant, on giving him or his attorney ten days' notice; and in default of the payment of the same on such notice being given, the court in which such appeal may be entered, may enforce the payment of the same by attachment, or in their discretion, dismiss the appeal.

2. The first section of the act, entitled, "An act concerning bail and attachments," shall be so construed as to require the payment by the appellant, to the prothonotary, of all costs which have previously accrued, whenever an appeal is entered from an award of arbitrators, excepting where executors, administrators, guardians or trustees are appellants.—p. 303.

[Act of April 21, 1846, Sect. 3.]

2. (*From decisions in equity.*) That any person or body corporate aggrieved by any final order or decree in equity,

under the general or special equity powers conferred upon the several district courts, and courts of common pleas of this commonwealth, other than those of the city and county of Philadelphia, in any suit or proceedings now pending, or which may hereafter be instituted, shall be entitled to an appeal to the supreme court, in the same manner, and upon the same terms, as appeals are allowed from the orphans' court.—p. 433.

APPRAISERS. (*Of mercantile tax to be appointed.*)—p. 489.

[Act of April 16, 1846.]

ASSESSORS. (*Duties of in regard to collateral inheritance.*)

That it shall be the duty of the assessors and assistant assessors of the several townships, boroughs, wards or districts within this commonwealth, whenever they shall be thereunto required by the commissioners, or register of the proper county, to proceed forthwith to make valuation and return of any property which may be designated to them as liable to the tax on collateral inheritances; and that they shall receive for their services, while so engaged, the same daily compensation as when engaged in the regular duties of their office, to be paid by the register, who shall be allowed credit therefor, in account with the state treasury.—p. 358.

2. (*Philadelphia, to return names of jurors.*)—p. 162.

[Act of January 28, 1846.]

ASSOCIATIONS. (*Unincorporated, debts due how recovered.*) That it shall not be lawful for any person who may have become indebted, or liable to pay any sum of money to any unincorporated association, to avail themselves, by way of defence to any action or judgment now brought or had, or which may hereafter be brought or had therefor, of the provisions of the act of nineteenth March, one thousand eight hundred and ten, entitled, "An act supplementary to an act relating to the association of individuals for the purpose of banking."—p. 11.

[Act of April 22, 1846, Sects. 4, 5 & 6.]

ATTORNEY-GENERAL. (*Duties of, in regard to forfeited recognizances.*) 4. That from and after the passage of

this act, all recognizances of bail, for the appearance of any one charged with a criminal offence, which are or shall be forfeited, before the court of oyer and terminer and general jail delivery, and quarter sessions of the peace, in the city and county of Philadelphia, which have been or shall be taken before either of the judges of the said court, or before any alderman or justice of the peace for the said county, and returned to the said court, shall be sued and prosecuted in the said court, and in no other court; and that the fees and commissions, for services rendered by the clerk of the said court, shall be the same as those prescribed for the prothonotaries of the courts of common pleas, for like services.

5. That it shall be the duty of the attorney-general, on the forfeiture of any recognizance in the said court, to issue process forthwith against the recognizers on the said recognizance, and to account to the treasurer of the said county for the proceeds of any judgment, or for any sum or sums received by him, on the suit so commenced.

6. That where the amount, or any part thereof of any judgment, recovered in pursuance of this act, shall be collected by execution or otherwise, the same shall be taken in open court, by the sheriff or other officer having received the same; and it shall be the duty of the judges of the said court, being notified of the payment of money as aforesaid, to order and decree a distribution of the same, in the following order, to wit: First, That so much thereof as shall be necessary, shall be applied to pay the costs on such prosecution, and on the proceedings before the magistrate who shall have taken such recognizance, together with such reasonable compensation as the court shall adjudge to the officers employed to arrest the person or persons, on whose default the said recognizance was forfeited, as well as those employed in the conduct and collection of such judgment: Second, That so much of the residue thereof, as will satisfy the amount of damage sustained by any person, by reason of the commission of such crime or misdemeanor, with interest thereon, to be counted from the date of the commission of such crime or misdemeanor, shall be applied thereto: Third, And that the residue of any moneys collected as aforesaid, be paid said

county, or into the treasury of the commonwealth, as the case may be: Provided, that it shall be in the power of the court, in all cases where the forfeiture is stricken off, before any money is paid into court as aforesaid, to order the county, or the defendant, to pay the costs and expenses hereinbefore provided for, as the case may require.—p. 477.

COLLATERAL INHERITANCES. (*Tax on.*) See **ASSESSORS.**

2. (*County Commissioners to publish registered accounts of.*) —p. 484.

3. (*Tax on increased.*)—Sect. 14, p. 489.

COLLECTORS OF STATE AND COUNTY TAX. (*Duty of on return of duplicate.*)—Sect. 19, p. 490.

2. (*Warrants of, good for two years.*)—Sect. 21, p. 490.

[Act of April 22, 1846, Sect. 4.]

COUNTY COMMISSIONERS. (*Duties of.*) It shall be the duty of the county commissioners of every county, to publish in detail the accounts of registers for collateral inheritance tax, as settled by the county auditors, in the same manner as the accounts of county rates and levies are now required to be published; and the auditor's wages for settling such accounts, shall be paid out of such tax.—p. 484.

COURTS. See **PARTITION—ROADS—ACTION.**

2. (*Nisi prius—September term abolished.*) See **ADMINISTRATORS.**

[Act of April 14, 1846.]

3. (*Of Philadelphia.*) 1. That so much of the several acts of assembly, authorizing the district court for the city and county of Philadelphia, to enter judgments for want of an affidavit of defence, as relates to judgments for want of affidavits of defence, be and they are hereby extended to all actions brought, and appeals filed in the court of common pleas, for the county of Philadelphia, wherever the cause of action would, in a like case, have authorized the entry of such judgment in said district court: Provided, that the writing or affidavit to be filed by the plaintiff, to entitle him to such judgment, shall be filed within two weeks after the return day of the suit, or the first day of the term to which an

appeal may be entered ; and the affidavit of defence shall be made before the third Saturday succeeding such return day, or term day, as the case may require ; and all writs of execution issued out of said court of common pleas, shall be returnable to the first Monday of the next month, or the first day of the term, at the option of the party issuing the same.

2. That from and after the first Monday in December next, it shall and may be lawful for the several courts in the city and county of Philadelphia, whenever a cause is reached in its order, on the trial list, and the plaintiff or his counsel does not appear, or if he appear; does not proceed to the trial of the cause, and does not assign and prove a sufficient legal cause for the continuance thereof, to enter a nonsuit without motion ; and no nonsuit shall be taken off by agreement, nor any cause continued by agreement, without the payment of four dollars to the prothonotary of the said court, for the use of the county of Philadelphia ; said payment not to be taxed as part of the costs of the cause, unless so agreed by writing filed : Provided, nevertheless, that the parties may, by agreement, at any time before the issuing of the venire, for any period, withdraw any case from the trial list, but the same shall not be entitled to be put down for trial at any subsequent period of the same term, without a special order of the court.

3. That the judges of the district court for the city and county of Philadelphia, are hereby authorized to appoint a commissioner, with authority to take depositions, to be read in the trial of causes in said court, or upon motions, rules, petitions, and other matters that may be brought before said court ; and the judges thereof shall provide such regulations as they shall deem expedient, setting forth the conditions upon which depositions taken, as aforesaid, may be read in evidence. And they shall have authority to supersede any commissioner to be appointed by them, by appointing another in his place.

4. The commissioner thus appointed, shall have authority to administer oaths and affirmations to the witnesses, where depositions may be taken, under the provisions of this act, and shall receive such compensation for his services as the

court shall direct, which shall be taxed among the costs of the suit, in which depositions shall be taken, in the same manner as depositions taken under the existing laws.—p. 328.

[Supplemental Act of March 21, 1846.]

4. (*Relative to juries in.*) 1. That grand jurors, and jurors for the trial of all issues of fact, in any of the courts holden in the county of Philadelphia, shall be selected in the manner following, and not otherwise.

2. The commissioners of the said county, or a majority of them, and the sheriff of the said county, shall meet together, on or before the first day of July, in each year, at the office of the said commissioners, and they shall then and there ascertain the whole number of names of jurors selected and deposited by them, in the year one thousand eight hundred and forty-five, in the respective wheels, containing the names of jurors for said county for the respective courts; and from the returns made into said commissioners' office, by the assessors for the respective wards and townships within the city and county of Philadelphia, they shall ascertain the whole number of taxable inhabitants returned; and thereupon the said sheriff and the said commissioners shall determine the number of names of jurors that each of said wards and townships shall furnish, in order to make up, in each year, at least twice the number so selected for the said year one thousand eight hundred and forty-five, and deposited in the said wheels for the said county respectively; the number of names to be furnished from the said wards and townships, shall be in the proportion that the taxable inhabitants of the said wards and townships respectively bear to the whole number of taxable inhabitants in the city and county of Philadelphia.

3. When the number of names of jurors for the said courts respectively, from each ward and township shall have been ascertained, the commissioners of said county shall, upon issuing their precepts to the assessors for the said city and county, require them, in addition to the duties now enjoined by law, to return, with their assessments and as part thereof, the names and surnames of as many sober, judicious and intelligent citizens of their wards and townships, for jurors for

said courts, as shall be equal to the number fixed by such commissioners for each court, and from the respective wards or townships, together with their occupations and places of residence, and the courts for which they have been so selected.

4. When the assessors shall have made the returns to the said commissioners, the said commissioners shall notify the sheriff of said county to meet at their office, on a day to be fixed, not more than one month thereafter; and when so met together, they shall clear the wheels of all names remaining therein, and shall deposit the names so returned by the said assessors in the respective wheels for said county, in the manner described in the eighty-eighth section of the act to which this is a supplement; and thereafter the said wheels shall be supplied only by the said assessors' returns, made under like requisitions from the county commissioners in every year.

5. The assessors shall file, upon their respective oaths or affirmations, in the offices of the said court respectively, immediately after their returns as aforesaid, a list of the jurors so returned from the respective wards and townships as jurors for said courts; and the respective prothonotaries of the said courts shall compare the names of jurors drawn from the wheels, with the list so furnished, whenever a venire of jurors shall be returned; and should any name be drawn or returned as a juror which is not on the assessors' list so filed, the said prothonotary shall immediately communicate the fact to the court for which the juror had been drawn; the name of such juror shall be stricken from the said list of jurors; and it shall be the duty of the said court forthwith to report and certify the facts of the case to the attorney-general.

6. Any person offending against the provisions of this act, shall be deemed guilty of a misdemeanor in office, and upon conviction thereof, shall forfeit and pay a fine of not less than one hundred nor more than one thousand dollars, and be imprisoned in the county jail for a term not exceeding one year.

7. So much of any previous act or acts of assembly as are inconsistent herewith, shall be and the same are hereby repealed.
—p. 161.

[Act of April 8th, 1846.]

4. (*Of Philadelphia—chancery powers of.*) That no courts

within the city and county of Philadelphia, shall exercise the powers of a court of chancery, in granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an act of the legislature, until the questions of title and damages shall be submitted, and finally decided by a common law court; and in such cases, the court shall have authority to issue a *venire* for the summoning of a jury, to the sheriff of an adjoining county.—p. 272.

[Act of April 22, 1846, Sect. 23.]

DECEDENTS. (*Estates of, how to be taxed.*) That where any person shall hereafter die, leaving real or personal estate, which, by the existing laws of this commonwealth, is subject to taxation for state or county purposes, such property, so long as the same shall belong to the estate of such deceased person, may be taxed in the name of the decedent, or in the name of his administrator or administrators, executor or executors, or his heirs generally, or in the name of any of the administrators, executors or heirs; and in taxing it in the names of the executors, administrators or heirs, it shall not be necessary to designate them by their christian or surnames; and such tax on such real estate shall remain a lien on the part taxed for the period of one year, from the first day of June following the assessment of said tax, and may be collected from the person or persons in possession thereof, in the same manner as is now provided by law; and all taxes heretofore thus assessed, are hereby declared to be legal, and may be collected in the manner herein provided: Provided also, that the expiration of the lien of said tax shall not prevent the collection thereof, within the time now provided in other cases; and where a different time is affixed by law for the existence of the lien of any such tax, this act shall not operate as a repeal of such law, but the same shall be construed as controlling the provisions of this section, so far as regards the time such lien is to continue in force.—p. 491.

[Act of March 14, 1846.]

DEEDS. (*Records of, official evidence in all cases.*) That all patents granted by the commonwealth, and all deeds of sheriffs, coroners, marshals and treasurers; and all deeds

made in pursuance of a decree of any court being duly acknowledged, may be recorded in the office for recording deeds in the county where the lands lie, and the records thereof, or duly certified copies thereof, shall be evidence in all cases where the original deeds or patents would be evidence; and where any of the deeds aforesaid, have heretofore been recorded in the office for recording deeds in the county where the lands lie, or in the office of the prothonotaries of the several courts of the city and county of Philadelphia, the records thereof or duly certified copies thereof, shall be as good evidence as if the same had been recorded under the provisions of this act.—p. 124.

[Act of April 21, 1846.]

EJECTMENT. (*Act relative to equitable action of.*) That in all actions of ejectment, hereafter tried, to enforce the payment of purchase money, wherein time becomes of essence in the finding of the jury, or in a judgment, by confession, by fixing a time for such payment, one verdict and judgment thereon unreversed, or a judgment in such case, by confession, shall be conclusive between the parties; and a failure to pay the money within the time so fixed, shall be deemed a rescission of the contract between the parties, and shall render such judgment absolute; and in all such actions tried since the fifth day of May, one thousand eight hundred and forty-one, wherein by the finding of the jury, or by a confession of judgment by the defendant, time became of essence as aforesaid, it shall be lawful for any such defendant, within two years after the passage of this act, to commence an action and therein to enforce his contract in such case, on paying the amount of purchase money, interest and costs, due thereon, together with such sum as the jury, trying the cause, may deem reasonable, for any improvement made, and increase in the value of the property since the trial of such case, to be paid within such reasonable time as may be fixed by the jury, under the direction of the court; and if not paid within such time, such failure to pay shall operate as an absolute rescission of the contract between the parties, and as a judgment for costs against the party so failing to pay.—p. 424.

EVIDENCE. See DEEDS.

[Act of April 22, 1846, Sect. 3.]

2. (*Parol when admitted.*) That in all cases wherein any person has been or may be subpœnaed with a subpœna, *duces tecum*, requiring the production of any title papers, or other documents whatsoever, on the trial of any suit, and said person has, or shall refuse to produce any such papers or documents, and for such refusal, has been or may be attached and imprisoned by the court, and subsequently discharged, persisting in such refusal, parol evidence shall be received in relation to the existence and contents of such papers and documents.—p. 483.

[Act of February 10, 1846.]

EXECUTIONS. (*Extended real estate under.*) That so much of the act, entitled, "An act relating to orphans' courts, and for other purposes," passed the thirteenth October, one thousand eight hundred and forty, as requires the plaintiff in any writ of *feri facias*, or his attorney, to give notice to the sheriff, signifying his election, to permit the defendant or defendants, or persons claiming under him or them, to retain the possession of real estate, as its valuation and appraisement, within ten days after holding inquisition, be and the same is hereby repealed; and it shall be lawful for any plaintiff or his attorney, to give the notice to the sheriff as is required by said act, at any time after holding inquisition; and in cases where any plaintiff or his attorney has heretofore failed to signify such election to the sheriff within the space of ten days after inquisition, it shall be lawful to do so at any time prior to the first day of October next, and to proceed therein in all other respects as to the acceptance or refusal of the defendant or other persons claiming under him, and as to sale of the premises, as is directed by existing laws: Provided, that this act shall not be construed to authorize a notice in any case wherein a writ *liberari facias* has been or may be executed.

The notice required to be given by the provisions of the act referred to in the first section of this act, from the defendant or defendants, or other person or persons claiming under him or them, to the sheriff, of his or their willingness to retain possession under the valuation of the inquest, may be given at any time within thirty days from the time of the

reception by him or them, of the notice of plaintiff's election to allow him so to retain the same; and in cases where the defendant or defendants or other person or persons so claiming, have neglected to give such notice within the time allowed, it shall be lawful for him or them, to give the same, on or before the first day of October next: Provided, that no such notice shall be given in cases where writs of *vend. exponas* have been or may be issued on account of the said notice not having been given according to law.—p. 37.

[Act of April, 1846, Sects. 7, 8, & 9.]

2. (*Property exempt from levy and sale under.*) From and after the passage of this act, the necessary tools of a tradesman shall be exempt from levy and sale, by virtue of any warrant or execution.

The following property, in addition to that already exempt from levy and sale, by virtue of any execution or distress for rent, shall, when owned by any person actually engaged in the science of agriculture, in like manner, be exempt from levy and sale, viz. one horse, mare or gelding, not exceeding in value fifty dollars; one set of horse gears; and one plough, or in lieu thereof, one yoke of oxen, with yoke and chain; and one plough, at the option of the defendant.

That from and after the passage of this act, it shall be lawful for the widow of any person dying intestate in this commonwealth, to retain for the use of herself and family, the same amount and description of property, which is now by law allowed and exempted from levy and sale, under the existing insolvent laws of this commonwealth, exclusive of what is allowed to the widow of an intestate, under the intestate laws of this commonwealth.—p. 477.

JUSTICES OF THE PEACE. See ALDERMEN.

[Act of March 11, 1846.]

MUNICIPAL CLAIMS. (*In Philadelphia County.*) That the third section of an act relating to the lien of taxes in the county of Philadelphia, passed the sixteenth day of April, one thousand eight hundred and forty-five, shall not be taken and construed to require that taxes heretofore registered in the office of the county commissioners of Philadelphia county, shall be again copied into another or separate books; but the registry thereof, in books heretofore, shall be deemed

and taken to be a compliance with the requisition of said act, in respect to taxes so registered; nor shall said act be construed or taken, as requiring the taxes of the year one thousand eight hundred and forty-five, to be filed before the first of July of that year, but on or before the first of July of the present year; and so much of said act as requires claims for taxes to be filed in the office of any prothonotary, and the revival of the same, as in case of mechanic's claims to continue the lien thereof, is hereby repealed; and all taxes registered as aforesaid, in said county commissioners' office, shall cease to be liens, after the expiration of five years from the first day of January in the year succeeding that in which they became due, unless suit be brought to recover the same, as it now is or may be provided by law for the recovery of the same, and duly proceeded in to judgment; and thereafter the lien of such judgments, and the transcripts filed of those recovered for taxes before magistrates, shall be and continue liens as in other judgments.

That recovery may be had on claims for taxes filed under the provisions of the said act, or of the act of the third of February, one thousand eight hundred and twenty-four, by the said county, or other corporation required to register its taxes; and in all cases where the claim shall exceed one hundred dollars, it shall be lawful to file a copy in the office of the prothonotary of the district court for the city and county of Philadelphia, and to proceed thereon by action of debt to recover a general judgment against the debtor or debtors, as is now provided by law in respect to said county, or to proceed thereon by *scire facias*, as in the case of mechanics' claims; and the claims so filed shall be *prima facie* evidence of the amount thereof, and of the same being due and owing, and judgment be entered by default therefor, unless the defendant shall file his affidavit of the nature of his defence, as required in other cases where the plaintiff has filed his copy of the cause of action in such court; and the judgment and execution shall be with the like effect as in other cases: Provided, that where any real estate, subject to such lien, shall have been conveyed, and deed recorded, after the assessment of the tax sued for, the present owner shall be served with the process; and if there be several owners of

distinct portions of the premises, recovery shall be had under the same writ against their respective shares, according to a just rateable proportion of the tax, costs and expenses of collection; and if any such owner shall be omitted, he may be brought in by a rule of the court on him, to show cause why he shall not be made a party to such suit; and on proof of service thereof, judgment may be entered against his share by default of appearance, or affidavit, as aforesaid: And provided, that no such apportionment shall effect the personal liability of the owner, at the time of the assessment, for the whole amount of the tax, interest and costs, including the five per cent. commission to be paid for such collection.

That in the city and county of Philadelphia, all writs of *scire facias* on claims for taxes, municipal charges and assessments, and for expenses of removing nuisances, shall be served by the sheriff of the said county, by posting a true and attested copy of the writ on a conspicuous part of the premises therein described, and by publishing a brief notice thereof in a daily newspaper in said county twice a week, for two weeks before the return day; on which service being made, the plaintiffs in such suits may proceed to recover judgments, as in suits on mechanic's liens.

Such claims may, in suits thereon, be read as evidence of the facts therein set forth; and no plea alleging nonjoinder, or misjoinder of parties; no plea averring want of notice to remove nuisances; no plea touching the rates or proportions of contribution among parties jointly interested; nor any plea touching the question of ownership, shall be allowed in any such action.

In all writs of *levari facias* on such claims, the sheriff's handbills and advertisements shall contain at the foot thereof a memorandum, setting forth the name of the party plaintiff, and the nature and character of the claim; in default whereof, the sale under such writ may be set aside by the court.

The lien of such claims shall not be divested by any judicial sale, as respects so much thereof, as the proceeds of such sale may be insufficient to discharge and pay.

So much of the act passed on the sixteenth day of April, one thousand eight hundred and forty-five, entitled, "An

Act vacating part of old Master's street, or Master's lane, in Penn township, in the county of Philadelphia, and for other purposes," as provides for the collection of registered taxes by the treasurer of the county of Philadelphia, shall be restrained in its operation and effect, to the collection of state, county, poor and road taxes only; and all other taxes, assessments and public claims shall be collected by, and under the authority of the corporations, respectively entitled to receive the same.

In all cases where the taxes on separate and distinct properties, in the said city and county of Philadelphia, shall be assessed together as one estate, it shall and may be lawful for the county commissioners, at any time before the payment of the said taxes so assessed, to apportion the same rateably, upon the said several and distinct portions of the property so assessed together; and no law now in force shall be so taken or construed, as to require the city of Philadelphia, or any district of the county of Philadelphia, or the board of health, to register in the office of the county commissioners, any claim for curbing, paving, grading, laying pipes or culverts, or the expenses of removing nuisances.

The fee to the prothonotary for filing, docketing, and indexing each claim for taxes or liens, and transcripts of judgments therefor, in the city and county of Philadelphia, shall be twenty-five cents.

All specific penalties and forfeitures enuring to the use of the board of health, or any municipal corporation of the county of Philadelphia, shall be recovered by suits, as debts of like amount are by law recoverable.—p. 114.

[Act of April 21, 1846.]

PARTITION. (*Jurisdiction of courts in action of.*) That nothing contained in the act, entitled, "An act relating to orphans' courts," passed on the twenty-ninth day of March, eighteen hundred and thirty-two, shall be construed to give to the orphans' courts of this commonwealth, exclusive jurisdiction in the partition and valuation of the real estate of intestates, or to prevent any of the parties interested in such real estates, from proceeding, by action of partition, in the other courts of this commonwealth, which have jurisdiction of the action of partition.

That all proceedings in actions of partitions, of the real estates of intestates, heretofore instituted in the courts of this commonwealth, which have jurisdiction of the action of partition, be and the same are hereby ratified and confirmed, to all intents and purposes, as if the courts in which such proceedings have been respectively instituted, had had jurisdiction thereof at the time they were instituted.—p. 426.

[Act of April 17, 1846, Sects. 1 & 2.]

PENAL LAWS. (*Boatmen selling property entrusted to their care.*) That if any person or persons, engaged in transporting coal, iron, lumber, or other articles of merchandise, or any property whatsoever, on any river, railroad or canal within this commonwealth, shall sell, dispose of, or pledge the same, or any part thereof, without the consent of the owner or owners thereof, such offence shall be deemed a misdemeanor; and on conviction therefor, shall be punished by fine, not less than fifty, nor exceeding five hundred dollars; shall suffer imprisonment in the county jail in which the offence is committed, for a term of not less than twenty days, nor more than one year, at the discretion of the court.

If any person or persons, after the first day of July, Anno Domini one thousand eight hundred and forty-six, shall purchase any coal, iron, or other articles of merchandise, or any property whatever, consigned to any person in this state, or in any adjoining state, knowing the same to be consigned from any captain of a canal boat, or any other person engaged in transporting the said property, without the consent of the owners of said property, he, she or they so purchasing, shall be liable to pay such owners double the value of the property so purchased, to be recovered with costs of suits, by action of trover or trespass, in the case; and the said action may be brought in the name of the consigner or consignee; and no prosecution by indictments against the person or persons having sold such property shall be any bar to such action.—p. 362.

REGISTERED TAXES. See **MUNICIPAL CLAIMS.**

[Act April 20, 1846, Sects. 1, 2 & 3.]

SALES, JUDICIAL. (*Lien creditors purchasing at.*) That from and after the passage of this act, whenever the purchaser or purchasers of real estate, at orphans' court or

sheriff's sale, shall appear from the proper record to be entitled, as a lien creditor, to receive the whole, or any portion of the proceeds of said sale, it shall be the duty of the sheriff, administrator, executor, or other person making such sale, to receive the receipt of such purchaser or purchasers, for the amount which he or they would appear, from the record as aforesaid, to be entitled to receive: Provided, that this section shall not be so construed as to prevent the right of said sheriff, administrator, executor, or other person aforesaid, to demand and receive, at the time of sale, a sum sufficient to cover all legal costs entitled to be paid out of the proceeds of said sale: And provided further, that before any purchaser or purchasers shall receive the benefit of this section, he or they shall produce to the sheriff, or other person so making said sale, a duly certified statement from the proper records, under the hand and official seal of the proper officer, showing that he is a lien creditor, entitled to receive any part of the proceeds of sale, as aforesaid.

It shall be the duty of the said sheriff, executor, administrator, or other person making sale as aforesaid, in all cases when he or they shall receive the receipt of the purchaser as aforesaid, to state the fact in the return of the proceedings of said sale, and attach thereto a list of the liens upon the property sold, which said return shall be read in open court, on some day during the term, to be fixed by the order of court; and if the right of said purchaser or purchasers, to the money mentioned in said return, shall be questioned or disputed by any person interested, the court shall, thereupon, appoint an auditor, who, after due notice given to the persons interested, in such manner as the court may direct, shall make a report, distributing the proceeds of such sale, with the facts and reasons upon which such distribution is made, to be approved by the court; or to direct an issue to determine the validity of said lien, and all further proceedings shall be stayed, until the said issue shall be decided; and in case it shall be determined that the said purchaser or purchasers were not entitled to receive said money, it shall be the duty of the proper court to set aside the sale, and direct the real estate to be resold, unless the money is paid to the sheriff, or other person making the sale, within ten days thereafter: Provided,

that nothing in this act shall be so construed as to prevent the purchaser or purchasers, in case the said real estate, upon the second or subsequent sale, does not bring a sum equal to the amount bid by him or them, from being liable for such deficiency: Provided, that before an issue shall be directed upon the distribution of money arising from sales under execution, or orphans' court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal by such applicant, if the issue be refused, in like manner, as in other cases, in which such writ now lies.

Upon granting any such issue, it shall be discretionary with the court, so soon as the money arising from such sale shall have been paid into court, upon the application of the party or parties appearing, by the record *prima facie*, entitled to the said fund, to order the same to be invested *pendente lite*, in the debt of the United States, or some other sufficient security, subject to the decree of the court.—p. 411.

[Act of April 22, 1846, Sect. 2.]

2. (*Sheriff's advertisement of.*) That from and after the passage of this act, it shall not be lawful for the sheriffs and coroners of the several counties of this commonwealth, to publish the sales of real estate, as required by the sixty-third section of the act of the sixteenth of June, A. D. eighteen hundred and thirty-six, in any two newspapers published in any one office, or in any two newspapers published by any one man, or any one company of men.—p. 476.

[Act of April 20, 1846, Sect. 4.]

That the provisions of the first section of the act of April sixteenth, eighteen hundred and forty-five, entitled "An act concerning sheriffs' and coroners' sales, and for other purposes," be and the same is hereby extended to all sales made by any sheriff or coroner, and for which deeds have been acknowledged, prior to the passage of this act, so far as to correct the error in making such sales, after the expiration of six days subsequently to the return day of the execution.—p. 412.

[Same, Sects. 5 & 6.]

TRESPASS. (*Action of regulated.*) That the several courts of common pleas of the sixteenth and seventeenth judicial districts of this commonwealth, shall have the same powers to make general rules and orders, as are given to the district court for the city and county of Philadelphia, by the act of the eleventh of March, one thousand eight hundred and thirty-six, entitled "A supplement to the act, entitled 'An act to establish the district court for the city and county of Philadelphia,' the twenty-eighth day of March, one thousand eight hundred and thirty-five."

In all actions of trespass *quare clausum fregit* now pending, or which may hereafter be brought, in which, upon the trial of the cause, the value of any goods or property taken, and damages for such taking and detention, only shall be claimed, if the legal right to such goods or property shall be found to be in the plaintiff or plaintiffs, he or they shall be entitled to recover the value of such goods and property, and damages, aforesaid, in the same manner, as in actions of trespass, for taking goods and chattels without regard to the form of action, and notwithstanding the plaintiff may not have had the possession or title or claim to the land, in which the trespass is by the writ and declaration supposed to have been done.—p. 412.

[Act of February 4, 1846, Sect. 6.]

WARDENS OF PHILADELPHIA. (*Supplement to act establishing.*) That from and after the first day of April next, so much of any law as authorizes the payment out of the state treasury, of any money for the salary of the master warden of the port of Philadelphia, or for contingencies or clerk hire in his said office, be and the same is hereby repealed; and thereafter, the said salary, contingencies and clerk hire, shall be paid out of the fees which the board of wardens of said port shall collect from vessels arriving at the said port of Philadelphia: Provided, that the said fees shall not be collected on vessels under the burthen of seventy-five tons, nor on any canal boats trading on the canals of this commonwealth, and shall not exceed fifty cents on each vessel: And provided further, that all fines and penalties as are directed by this act, and the

various acts to which this is a supplement, to be paid into the state treasury for the payment of the salary of master warden, clerk hire, and the contingent expenses of the office of the wardens, shall, from and after the first day of April next, be retained by the wardens of the port of Philadelphia, and applied by them in conjunction with the fees herein specified, to the payment of the salaries and contingent expenses of their office.—p. 30.

[At the request of a subscriber, we republish from a back volume of Hazard's Pennsylvania Register, the three following opinions.]

IN THE SUPREME COURT OF PENNSYLVANIA.

[1828.]

COMMONWEALTH EX REL. JOHN SHAW ESQ., JUSTICE OF THE
PEACE OF PHILADELPHIA COUNTY *v.* THE COMMISSIONERS OF
THE COUNTY OF PHILADELPHIA.

This was a rule for the county commissioners to show cause why a writ of *mandamus* should not issue against them, commanding them to pay to the relator, certain costs accrued in prosecutions for felony, of which the defendants were convicted or acquitted.

Thomas Sergeant, for the defendants, showed cause, and relied upon the various acts of assembly relating to penal prosecutions; that in none of them the county was required to pay to *magistrates* the costs accrued in the convictions or acquittals for larceny or other offences; that the charge upon the county, if it were so, would be onerous and unjust in the extreme, and that there would be an immediate drain upon it to the extent of many thousand dollars; that neither law or practice authorized the payment of any other fees than those of the attorney-general, sheriff and clerk.

Willing & Tilghman, for the relator, replied, that the obvious intention of the law was to indemnify all the officers for their services in criminal prosecutions, and of course for the benefit

of society; that it was manifestly *unjust to require private persons* to defray an equitable and righteous charge upon the public, to ask for the costs in prosecutions intended and conducted for their own good, and not for private benefit; that as it now stands, persons prosecuting for robbery, larceny, &c., are required to pay magistrates and constables fees of prosecution; thus restraining the detection of crime, and levying a heavy tax upon private individuals, when they are doing a great benefit to society, &c.

The court, per GIBSON C. J., declined to give any opinion upon the question, *whether the county commissioners were liable to magistrates for costs in criminal prosecutions*, and refused to grant the mandamus asked for; but ordered an issue to be framed, to be tried at nisi prius, to ascertain the amount actually due to the relator, and upon the trial of that issue, the decision of the court upon the question of law will, of course, eventuate.

This interesting question, which concerns to a certain extent every county in the commonwealth, and a different practice prevailing in the state, some counties paying and others refusing to pay magistrates' fees, is approaching a final issue, after an agitation of several years. It would seem to be more than just, to visit upon the funds of the public, the actual charges for conducting police, administering the penal code, arresting crime, and securing the peace and happiness of the community.

IN THE MAYOR'S COURT.

[March 26, 1828.]

COMMONWEALTH v. M'CLUNG.

1. It is an indictable offence to keep and to allow to go at large, any dangerous, ferocious, or biting animal.

This was an extraordinary case in the law of nuisance; the indictment charging the defendant with keeping a furious and dangerous dog, to the annoyance and fear of the neighbourhood and passers-by.

The evidence was nearly this: For four years, Mr. M'Clung, who lives in Pine near Second street, has had a dog, kept as a

watch dog to guard his premises; the witnesses differed as to his real character, some asserting that he was a vicious, others a docile creature. It was clear that he had bitten several persons; as many as sixteen distinct bites were given in evidence; and among the rest, none suffered more severely than Mr. Irving's family, in that neighbourhood. Several children were produced, and proved that they had been assaulted and bitten by the dog, some while passing the house, others while in Mr. M'Clung's shop. It was the habit of Mr. M'Clung to keep the animal chained while in his shop, on week days, but sometimes he would let him go abroad, and always on Sunday, he gave him his liberty. Mr. Irving requested the defendant to keep him constantly chained, and murmured about the dangers and fears of the neighbourhood;—the defendant refused to do so, and said that he could keep him at home on week days, because the mayor would kill him if he went abroad, but on Sundays, dogs were allowed to range freely, and so should his. Mr. Irving, after this answer, commenced the prosecution, and shortly afterwards the defendant sent his dog away.

The defence set up was predicated on the testimony of several of the neighbours, who testified that they did not fear the dog; that he did not annoy them; that he was a docile dog, except when vexed or chafed; and that he guarded M'Clung's house against depredation, and also an adjoining stable yard. It was also urged that the offence was not indictable criminally, but only recoverable for in damages, in a civil proceeding.

The recorder, judge REED, after stating the facts to the jury, in a clear manner, distinctly laid down the law in favour of supporting the indictment; that it was an indictable offence to keep and to allow to go at large, any dangerous, ferocious, or biting animal, to the annoyance and terror of the neighbourhood or the public.

The jury, after a short interval, gave a verdict of "guilty."

IN THE COMMON PLEAS OF PHILADELPHIA
COUNTY.

[1827.

CLARK v. — ESQ., ONE OF THE ALDERMEN OF THE CITY OF
PHILADELPHIA.

This action was brought to recover of defendant the penalty of fifty dollars, for extorting and exacting illegal fees. The facts were these: Early in 1827, Clark the plaintiff was brought before the defendant, on a warrant, charged with an outrageous assault and battery. After a hearing, he was bound over to answer the charge, gave bail, and paid to the alderman, \$1 41, the sum demanded as costs. Three days after this, he sent a man to the alderman's office to get a bill of particulars; the alderman again demanded the costs \$1 41, and 37 cents additional, all which were paid to him and a receipt taken.

The defendant's counsel contended, and it seemed pretty evident, that the second set of costs was demanded in a moment of hurry, by the alderman, forgetting that they had been already paid.

The court, KING president, laid down the following rules of law to the jury:

1st. That a magistrate is not protected against penalties for extortion, on the plea of innocent intention or unintentional error; he is presumed and bound to know the fee bill; it is comprehensive and clear, and every item of chargeable service is distinctly set down. If a magistrate goes beyond the fee bill he is liable for the penalty. 2d. A magistrate on binding over a defendant in a criminal action, has no right to take from him any fees beyond those for the recognizance and the commitment and supersedeas; and then only if such services be actually performed. *Verdict for plaintiff, \$ 50.*

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

[July 11th, 1846.]

JOHNSON V. PATTERSON ET AL.

Practice, under the rule of court relating to judgments for want of an affidavit of defence, after the 5th Monday of the second term.

Rule to show cause why the judgment should not be opened. This was an appeal by the defendant from the judgment of alderman Smith. The transcript, which is as follows, develops the cause of action :

“Summons issued October 28, returnable November 3, 1845, at 4 P. M. Service accepted, November 1, 1845. November 3, 1845, *Mr. Thayer*, counsel for plaintiff, and *Mr. Randall*, counsel for defendants, appear, and case continued to 13th inst.—November 13th, continued to 14th at 9 A. M.; continued to 21st at 9 A. M. And now, November 21st, plaintiff by his attorney appears and claims \$38 40, being the amount overpaid to defendants on the 30th June, 1845, on 33549 lbs. tallow purchased from them, amounting to \$2264 55: this bill being paid to defendants and a deficiency afterwards found in the weight of tallow of 569 lbs. at 6½ cts., = \$38 40, which is the plaintiff’s demand. Defendants not appearing, judgment by default in favour of plaintiff, for \$38 40, November 21, 1845. December 9, 1845, defendants appeal.”

(With the usual certificate.)

After the filing of the transcript in the common pleas during the term to which the appeal was entered, the plaintiff filed his narr. which consisted of a single count for money had and received, and on the day succeeding the 5th Monday of the next succeeding term to which the appeal was entered, no affidavit of defence having been filed by the defendants, the plaintiff entered judgment for want of an affidavit of defence under the following rule of this court :

Rule 1. “In all actions brought or hereafter to be brought in this court, of debt or contract, where special bail is not required, the plaintiff shall be at liberty to direct judgment by default to

be entered of course in the prothonotary's office at any time after the 5th Monday of the next succeeding term to which the process issued is returnable, or an appeal entered, unless the defendant or some person for him or her shall have made an affidavit and previously filed the same in the prothonotary's office stating that to the best of his or her knowledge and belief, there is a just defence in whole or in part in the said cause; and if the defence be to part only, the defendant shall specify the sum which he admits to be due, and judgment may be entered for the plaintiff for so much as is or shall be thus acknowledged to be due: provided always that no judgment shall be entered by virtue of this rule, unless the plaintiff shall have filed a declaration during the term to which the process issued is returnable or an appeal entered."

Under this state of facts, it was held by KING, president, that this was not a case to which the rule of court above quoted, was applicable, and the rule for opening the judgment was made absolute.

Randall, for defendants.

Thayer, contra.

IN THE COMMON PLEAS OF CHESTER COUNTY.

[March, 1845.]

CLEVENSTINE v. LAW.

1. An attachment execution, *sur* transcript of the judgment of a justice of peace, filed in the office of the prothonotary of the common pleas, cannot be issued, before an execution by the justice and a return thereto, of "*nulla bona*."

This was a rule to show cause why an attachment execution should not be set aside.

Rutter argued for the defendant.

Lewis for the plaintiff.

The point involved and decided, sufficiently appears in the opinion of the court, delivered by

BELL, president. The single question presented by this case, is whether an attachment execution, given by the 35th section of the act of 16th of June, 1836, can be issued on the transcript of a judgment of a justice of the peace, entered in the prothonotary's office, in pursuance of the 10th section of the act of

20th of March, 1810; before an execution issued by the justice and returned "*nulla bona*?" The section last cited, after authorizing the entry of such transcripts upon the prothonotary's docket and making them liens on the defendant's real estate, provides, "but no *fi. facias* shall be issued by any prothonotary, until a certificate shall be first produced to him from the justice before whom the original judgment was entered, stating therein that an execution had issued to the proper constable as directed by this act, and return thereon, that no goods could be found sufficient to satisfy said demand." It was, at one time thought, and I confess I should have been of this opinion, that the object of the act of 1810 and of prior acts on the same subject, was to give the plaintiff a lien upon and remedy against the lands of the defendant; which he could not have by execution issued by the justice; see *Drum v. Snyder*, 1 Binn. 381; *Brannon v. Kelly*, 8 S. & R. 479; and therefore, a *fi. fa.* was prohibited, before the plaintiff had tried the efficacy of a justice's execution against the goods of the defendant. But in *Hitchcock v. Long*, decided in 1841, 2 W. & S. 169, it is determined that the object of the act was not merely to create a lien on lands and to confine the plaintiff's remedy to a sale of them, upon process to be issued out of the court, but that he may, by virtue of a *fi. fa.* take and sell the goods of the defendant, in satisfaction of the judgment; the only restraint imposed by the act, being that the plaintiff should not sue an execution out of the court until there be a return of *nulla bona* before the justice. Why is it, asks Mr. justice Rogers, who delivered the opinion of the court in that case, that the plaintiff is prohibited from issuing a *fi. fa.* in court, until a return of *nulla bona*? He answers, "It is to save costs to the defendant." This is the sole reason why the defendant's goods cannot be taken, in the first instance, by virtue of a *fi. fa.* But for this, as I understand the reasoning of the court, the statutory inhibition would not have had place. The same case decides that a judgment, *sur* transcript, may be enforced by the attachment execution given by the act of 1836, because it is a judgment of the court of which, after the return of *nulla bona*, the plaintiff may proceed to enforce payment in the same manner, as on any other judgment, and the attachment being, in its nature, an execution, falls within the reason and spirit of the act, and may be employed in lieu of the *fi. fa.*

It is, so far as personalty is concerned, like a *fi. fa.*, for as this empowers the plaintiff to reach the personal chattels of the defendant, as well as his lands, after a return of *nulla bona*, that enables him to levy on *choses in action*, which are regarded and treated as personal estate by the act of 1836. Now there can be no doubt that if the term "execution" were used in the act of 1810, instead of "*feri facias*," the peculiar process given by the act of 1836, would have been within the letter of the elder statute. But if the object of the prohibitory clause in this statute was, as is asserted, to save costs to the defendant, the intent was to prohibit all process by execution in court, until a trial of the cheaper process to be issued by the justice, and the mode of execution by *fi. fa.*, was particularly noticed, because it was the only form of writ then known, in our practice, by which the real and *personal* property of a defendant could be reached, to enforce payment of a judgment. The attachment execution being, therefore, within the reason of the prohibition, is comprehended in the spirit of the act of 1810, though not strictly within its letter, and consequently cannot be had recourse to but in pursuance of the provisions of that act. It follows that the process was issued in this case prematurely, and must be set aside. I may add that this determination is in accordance with *Hitchcock v. Long*, throughout which case, it was taken for granted that a return of *nulla bona* must precede the issuing an attachment of execution.

Rule absolute.

[July, 1846.]

WILSON V. WILSON, EXECUTOR, &C. OF WILSON.

1. A justice of the peace, before whom suit is brought against one in his private and individual capacity, may before hearing, so amend the entry of the proceeding on his docket, as to show the action to be against the defendant *as executor*, especially after notice to the defendant that such was the fact.
2. A statement on the docket of the magistrate that the plaintiff's demand is founded on an account rendered, for services rendered by the plaintiff to the defendant's testator, in his lifetime, sufficiently satisfies the statutory requirement that the kind of evidence upon which the plaintiff's demand may be founded, shall be set out on the docket.

3. Unless it appears upon the face of the proceedings that the justice proceeded and rendered judgment upon the plaintiff's own oath, it must so be distinctly averred by way of exception, and shown by proof.

This was a *certiorari*, sued out by the defendant, to remove the proceedings of a justice of peace. By the transcript returned, it appeared that the summons by which the action was commenced, originally issued against the defendant, individually, and without naming him as executor. On the return day he did not appear, having previously sent a letter to the justice, denying that he owed any thing to the plaintiff. On the return day the hearing of the case was continued by the justice to a day certain, "for further information." Before the day to which the case was adjourned, the justice gave notice, in the form of a summons, to the defendant, that he had sued as executor, and of the day to which the hearing was adjourned. The defendant again wrote to the justice that he had not been sued as executor, and refused to appear. He did not appear, and judgment was rendered against him by default, for the amount of the plaintiff's demand, "on an account, rendered under oath, for services rendered to John Wilson, (the defendant's testator), in his lifetime."

Upon the return of the *certiorari*, the following exceptions, *inter alia*, were filed by the defendant, in pursuance of the rule of court, to the justice's proceedings :

1. The summons is against the defendant, personally, and not in his representative character, as executor, and the judgment is rendered against him in his representative character.
2. It does not appear on what kind of evidence the plaintiff's demand is founded.
3. The judgment was rendered, by default against the defendant as executor, without any legal summons having been served upon him.

After argument by *Lewis* for defendant, and *B. F. Pyle* for plaintiff, the opinion of the court was delivered by

BELL, president, as follows: Upon the authority of the cases of *Caldwell v. Thompson*, 1 R. 370; *Lyon v. Chalker*, 2 W. 14; *Graham v. Vanderlove*, id. 131; *Comfort v. Leland*, 3 Wh. 81; *Goffin v. St. Clair Township*, 4 W. & S. 327; and *Logan v. Chandler*, 4 Penn. L. J. 297; there can be no question but that the mistake committed by the justice, in this case, in not naming

the defendant as executor, in the summons issued against him, would, upon an appeal from the justice's judgment, have been amendable, by describing the party by his representative character, in the narr. In such case, the rule is clear, that the mistakes and slips of the justice are to be disregarded or corrected. Provided the cause of action remains the same, the form of the suit may be changed, to make it accord with the merits, and for this purpose, the names of the parties may be transposed or changed, and the true parties shown by averment; so also, though the defendant be sued in his individual and private capacity, and the judgment of the justice thus rendered against him, he may be declared against as executor or administrator, and no advantage can be taken of the variance. As is said in *Graham v. Vanderlove*, "the variance is but in matter of form, which sound policy, having respect to the peculiar circumstances, connected with the jurisdiction of justices of the peace, requires should not be made the subject of a demurrer." In *Lyon v. Chalker*, it is remarked, that in regard to the proceedings of a court of record, where the legal party must be disclosed by the record, it would not be admissible, in case of mistake, to show the real party by averment; but it is essential there should be a different rule for proceedings before justices of the peace, from whom no more can be required than substantial justice, without respect for technical forms; and, as they are not judges of a court of record, the truth of the case in respect to their proceedings, may be shown by parol. Perhaps the generality of this remark ought to be qualified by adding, so far as is necessary to show who were the parties, and the character in which they respectively sued or were sued. If upon this reasoning and under the rule founded upon it, the formal statement of the action in the process and on the docket of the justice, may be changed, by substituting the names of the real parties, or by adding the technical description of the character in which they acted, even after an appeal, it follows, *a fortiori*, that while the proceedings remain before the original forum, which is not bound to proceed according to strictly technical forms, a merely formal slip, such as occurred here, by the omission to name the defendant executor, may be corrected, before final judgment, provided no injustice be thereby done to the defendant. Nay, upon the liberal principles and practice

in the allowance of amendments, which have obtained in Pennsylvania courts of record, why should not such an amendment as was made in this case, be allowed even there, by permitting a declaration against one as executor, who had been sued individually? The converse of this has frequently been done with the sanction of the courts, and I see no good reason why the representative character may not be added as well as omitted. In neither case would the variance seem to be material. See *Gratz v. Phillips*, 1 Br. R. 585; *Jennings v. Cox*, cited in note to last case. But the case does not call for a decision of this point. It may, safely, be placed upon the less technical character of the proceedings before justices of the peace, and the rules which govern them, and which, I think, admit of amendments both in matter of form and substance, before and after appeal, where these do not affect the legal rights of the parties. Without determining, therefore, whether the second precept sent by the justice to the defendant, might not be considered, substantially, a new summons, which the defendant was bound to obey, it is sufficient that it operated as a notice to him of the character in which he was sued, so as to prevent any surprise upon him. I am not prepared to say but that, without this, the amendment might have been made upon the docket of the magistrate; but certainly, with it, the defendant has no pretence to complain of injustice. He was legally summoned to appear before the appropriate tribunal, where it was his duty to attend, and before the day of hearing, was fully informed of the capacity in which he was sued. Under these circumstances, it was not competent for him to fold his arms, and in the expectation of deriving advantage from a technical slip, refuse to obey the mandate of the magistrate. This course was pursued at his own peril, and he must take the consequence of the step.

But independent of the general principles we have been discussing, I think these proceedings, in the point now under consideration, may be maintained under the provisions of the 22d section of the act of the 20th March, 1810. It has been shown that the omission to name the defendant as executor, in the summons, was a merely formal slip. Now by the section just cited, it is provided that the proceedings of a justice of the peace shall not be set aside or reversed, on *certiorari*, for want of formality in the same, if it appear that a precept issued in

the name of the commonwealth of Pennsylvania, requiring the defendant to appear before the justice, on some day certain, &c., and that judgment was rendered on the day fixed, in the precept, or on some other day to which the cause was postponed by the justice, with the knowledge of the parties. All this appears in the present instance, and consequently the proceeding is not to be reversed for mere informality. This conclusion is in accordance with *Comfort v. Leland*, *supra*.

This disposes of all the exceptions insisted on, but one, to wit, that it does not appear on what kind of evidence the plaintiff's demand is founded. But it does appear, the demand was founded on an account rendered, for services rendered by the plaintiff to the defendant's testator, in his lifetime. This is sufficient to satisfy the requirement of the statute in this particular, and to show the justice possessed jurisdiction of the subject matter.

It is not made a matter of distinct exception, that the justice rendered judgment upon the testimony of the plaintiff's oath alone, nor does this appear to have been the case, upon the face of the proceedings returned, with sufficient distinctness to warrant the court in setting aside the judgment, for this cause.

If such were the fact, it should have been distinctly averred, by way of exception, and as distinctly shown.

Upon the whole, we perceive no error in the proceedings returned, and they are, therefore affirmed.

IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF PHILADELPHIA.

MORRIS V. TURNER.

1. A claim for *general average* is a debt contracted and owing, for the recovery of which the process of foreign attachment may issue.
2. A rule was taken to June term, 1846, to dissolve a foreign attachment commenced by writ to December term, 1845: Held, not to be too late.

SHARSWOOD J.: This was an action commenced by writ of foreign attachment returnable to December term 1845. A rule has been taken on behalf of the garnishee on the plaintiff to show his cause of action, and why the attachment should not

be dissolved, which rule was made returnable on the first Monday of the present term, June, 1846.

It is objected that the motion in this case was too late. This objection presented itself to the court, when the application was first made, and the rule was granted after full consideration. It seems to be settled, that a motion for a rule to show cause of action in foreign attachment is too late at the third term, and after judgment. *Whitesides v. Oakman*, 1 Dall. 294; *Penman v. Gardiner*, 4 Yeates 6; *Manuel v. The Mississippi & Alabama R. R. Co.*, 2 Miles 398.

Within what period however, the motion must be made, is an unsettled question, at least so far as the reported cases go. In an early case in the common pleas of this county, it was held that the application must be made at the first term. *Miltenberger v. Lloyd*, 2 Dall. 79. In *Mills et al. v. M'Farland*, on the contrary, in the supreme court (Serg. on Attach. 138) where the writ had issued to December term 1805, a rule was granted at March term 1806, and was made absolute, although resisted on the authority of *Miltenberger v. Lloyd*. In a later case, the supreme court decided that the motion was in time at December term, where the writ was returnable at the preceding July term. July term consisting of but one day, the court being then held for the purpose of receiving returns, and not having been generally considered as a meeting for business. *Kearney v. M'Cullough*, 5 Binn. 389. The reasons given in this case, therefore, rather recognise the practice as stated in *Miltenberger v. Lloyd*.

This is a proceeding against an absent defendant. His property may be seized by this process, and kept from his possession and enjoyment, without the shadow of a cause of action, unless the courts are liberal in affording an opportunity for examination. Either from the distance at which the defendant may reside, or the negligence of the garnishee, notice of the proceeding may not reach him until long after the expiration of the first term. It would be harsh to require the same vigilance, as in the case of a defendant on the spot. The reason of the rule of court in *capias* cases, was, that after the expiration of the first week of the term, the defendant being present, and having been served with the process, was deemed to have acquiesced in the arrest. And, as unless in certain cases it was not the practice to prepare the affidavit before the writ issued, although it was

always held to be immediately demandable, the plaintiff relying upon the acquiescence of the defendant, presumed from his delay, may have gone away without taking the precaution to leave his affidavit. There can be no acquiescence presumed in so short a time, as against an absent defendant, and although, as against the garnishee, it may be otherwise, it is to be observed that he has no personal interest in the preliminary proceeding to ascertain the debt, and is permitted to intervene, only to protect the interest of the absent defendant—the court not requiring him, standing in the position he does, to produce a formal authority. We see no reason therefore to change the views entertained by the court, when this rule was granted.

The plaintiff has shown as cause of action, a claim for general average, and it has been objected that this is not a *debt contracted or owing*, for the recovery of which this process may be used. It has been urged that it only lies in cases of express contracts. This would very much narrow this remedy, which has been liberally extended by the courts, as a reasonable and beneficial one. The authorities are, however, that it extends to implied as well as express contracts. The affidavit indeed must show a contract, or such facts from which the law would necessarily imply a contract. It is not enough to set out facts, from which perhaps a jury might infer a contract, and perhaps not. *Jacoby v. Gagell*, 5 Serg. & R. 450. It is sufficient that it is a demand arising *ex contractu*, the amount of which is or can be ascertained, so as to enable the plaintiff to aver it as a sum certain. *Fisher v. Consequa*, 2 Wash. C. C. Rep. 382.; *S. C.* 2 *Browne Rep. Appendix*, 28; *Clark's exrs. v. Wilson*, 3 Wash. C. C. Rep. 562. Thus a claim for work and labour done on a *quantum meruit*, or for goods sold and delivered on a *quantum valebant*, may be prosecuted without doubt by foreign attachment. In like manner the claim for contribution to general average, is not a claim for unliquidated damages, but a sum certain when the facts upon which the calculation is based are ascertained.

Rule discharged.



ENGLISH CASE—IN CHANCERY.

BROWN V. BAMFORD.

1. A testator bequeathed certain property to trustees upon trust from time to time during the life of S. B., (a married woman,) to pay the clear rents, interest, dividends, &c., unto such person or persons, for such intents and purposes, &c., as the said S. B., by any writing, &c., should appoint, but not by way of assignment or other anticipation; and, in default of appointment, into her proper hands, for her sole and separate use; the receipts of S. B. or her appointees to be good discharges to the trustees. Held, (reversing the judgment of the vice chancellor of England,) that the general limitation in default of appointment did not enable S. B. to anticipate; and that the case did not depend on the form of the receipt clause.

This was an appeal from the judgment of the vice chancellor of England, pronounced 27th May, 1842; and a report of the case as decided by his honour, will be found in vol. 1, *N. Y. Leg. Obs.*, p. 110. S. C. 11 *Sim.* 127. The question arose under the will of John Beckett, the terms of which are fully stated in the following judgment, and the point in dispute was, whether the will contained such a declaration against anticipation as to prevent the testator's daughter anticipating the estate as *owner*. The vice chancellor of England considered that it did not. On the 10th March, 1843, the case was heard on appeal before the lord chancellor.

Bethell and *J. Bailey*, for the appellant.

Stuart and *Simpson*, in support of the judgment of the vice chancellor.

May 16th, 1844.—The lord chancellor intimated his intention of affirming the decision of the vice chancellor, and dismissing the appeal. The case was, however, at the desire of his lordship, subsequently re-argued; and this day (June 6th, 1846) the lord chancellor delivered judgment.

THE LORD CHANCELLOR: This is an appeal from a decree of the vice chancellor of England. When the case first came before me I expressed an opinion upon it in accordance with the judgment of the vice chancellor; but afterwards, entertaining doubts as to the correctness of that opinion, I directed the case to be again argued. The result of that argument, and the subsequent consideration of the case, has led me to change the opinion I had previously formed. The testator, John Beckett, by his will, dated the 21st September, 1832, gave certain lease-

hold houses and stock in the funds to trustees, upon trust, from time to time during the natural life of his daughter, Sophia Bamford, or until she should be duly declared bankrupt, or take the benefit of any act for the relief of insolvent debtors, to pay the clear rents, interest, dividends, and proceeds of such leasehold hereditaments, stocks, funds, and securities, as to such person or persons, and for such intents and purposes, and in such manner, as Sophia Bamford, by any writing or writings under her hand, when and as the same shall become due, but not by way of assignment, charge, or other anticipation thereof, should, notwithstanding her then present or any future coverture, direct or appoint; and, in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands, for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband. And the testator directed that the receipts in writing of his daughter, Sophia Bamford, should, notwithstanding any such coverture, be good and sufficient discharges to the trustees for the last mentioned rents, interest, dividends, and proceeds, or so much thereof as should in such receipts respectively be expressed to have been received. It was obviously, I think, the intention of the testator that the income of the property should be kept entire for the use of his daughter, and that it should not be charged or disposed of, except as the successive payments should become due;—that it should not be in any way anticipated. It cannot reasonably be supposed that he would be so careful, as he evidently has been, to exclude one mode of anticipation and at the same time mean to leave the property subject to alienation, even to its full extent, in another form. The question, therefore, is, whether the terms used by the testator are sufficient to enable the court to give effect to this intention. The trust is to pay the rents to such persons as Sophia Bamford, by any writing under her hand, when and as the same shall become due, should direct and appoint, but not by way of assignment, charge, or other anticipation thereof; and, in default of such direction or appointment, or so far as the same, if incomplete, shall not extend, into her own proper hands, for her sole and separate use. The right to appoint is not to be exercised until the rents and other income become due, and then only to the extent of what is due. In default of any such appointment, the

rents, &c., and those only, or so much of them as shall not have been appropriated by the appointment, are to be paid into her own hands. All this is very clearly and precisely expressed. The negative words in the clause, viz. "but not by way of assignment, charge, or other anticipation," remain to be considered. The question depends upon the effect of these words. The daughter, Sophia Bamford, is not allowed, by means of any assignment, charge, or other anticipation, to direct the payment or the application of the rents, &c., by the trustees; but any assignment, charge, or other anticipation, if effectual, would operate as a direction, and this was evidently so considered by the testator or other person who framed this clause. The effect, therefore, of the prohibition is to restrain Sophia Bamford from assigning, charging, or in any manner anticipating the income, or exercising any dominion or control over her life estate, unless in the form and under the restrictions contained in the power of appointment. She is precluded from assigning, charging, or in any manner anticipating the rents or other income; but she is permitted, when and as they become due, and not before, to direct the application of them; and, in default of any such direction, they are to be paid into her own hands. I think this is the true construction of the clause, and it corresponds with what I consider to have been the manifest intention of the testator—namely, that the continuance of the income during his daughter's life, should be secured for her benefit. The case does not in any degree depend upon the terms of the receipt clause. The observations of the learned judge upon that point appear to have arisen from what occurred incidentally in the course of the discussion. I certainly do not understand that the decision was rested on any such ground. His honour considered that the question came within the principle upon which he had decided *Barrymore v. Ellis*, viz. that where a limited power of appointment is created, and, in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power, the execution of which he is at liberty to waive and abandon. The question, however, is not as to the principle so stated, but as to the application of it to the present case. I think it has no such application. The restriction against anticipation extended to the whole gift. This is the true construc-

tion of the bequest, and it corresponds with what was the manifest intention of the testator. I must farther observe, that the receipt clause in this case is in all its material parts the same as in the settlement stated in the case of *Barton v. Briscoe* (Jac. 603.) That was a case very much considered by the court and the bar; but it would have been wholly unnecessary to discuss the important question there decided, if it had been supposed that the clause would have admitted of the interpretation given in the present instance by the vice chancellor. For these reasons this appeal must be allowed.

[Although the following discourse differs in character from the usual matter of the Journal, yet we have no doubt it will be read by such of our subscribers at least, before whose observation it has not heretofore passed, with great interest and edification. We have had frequent requests made to us from time to time, to insert it, but never have had space sufficient at disposal to enable us to do so, until the present.]

THE LAWYER THAT TEMPTED CHRIST.

A Sermon; preached in the Cathedral Church at St. Peter, York, before the Hon. Sir John Bayley, Knt., one of his Majesty's Justices of the Court of King's Bench, and the Hon. Sir John Hullock, Knt., one of his Majesty's Barons of the Court of Exchequer, August 1, 1824.

AND BEHOLD, A CERTAIN LAWYER STOOD UP, AND TEMPTED HIM, SAYING, MASTER, WHAT SHALL I DO TO INHERIT ETERNAL LIFE.—*Luke x. 25.*

This lawyer, who is thus represented to have tempted our blessed Saviour, does not seem to have been very much in earnest in the question which he asked; his object does not appear to have been the acquisition of religious knowledge, but the display of human talent. He did not say to himself, I will now draw near to this august being; I will inform myself from the fountain of truth, and from the very lips of Christ; I will learn a lesson of salvation;—but it occurred to him, that in such a gathering together of the Jews, in such a moment of public agitation, the opportunity of display was not to be neglected: full of that internal confidence which men of talents so ready, and so exercised, are sometimes apt to feel, he approaches our Saviour with all the apparent modesty of interrogation, and, saluting him with the appellation of Master, prepares, with all professional acuteness, for his humiliation and defeat.

Talking humanly, and we must talk humanly, for our Saviour was then acting an human part, the experiment ended, as all must wish an experiment to end, where levity and bad faith are on one side, and piety, simplicity and goodness on the other: the objector was silenced, and one of the brightest lessons of the gospel elicited, for the eternal improvement of mankind.

Still, though we wish the motive for the question had been better, we must not forget the question, and we must not forget who asked the question, and we must not forget who answered it, and what the answer was. The question was the wisest and best that ever came from the mouth of man; the man who asked it was the very person who ought to have asked it; a man overwhelmed, probably, with the intrigues, the bustle, and business of life, and, therefore, most likely to forget the interests of another world: the answerer was our blessed Saviour, through whose mediation, you, and I, and all of us, hope to live again, and the answer, remember, was plain and practical; not flowery, not metaphysical, not doctrinal; but it said to the man of the law, if you wish to live eternally, do your duty to God and man; live in this world as you ought to live; make yourself fit for eternity; and then, and then only, God will grant to you eternal life.

There are, probably, in this church, many persons of the profession of the law, who have often asked before, with better faith than their brother, and who do now ask this great question, "What shall I do to inherit eternal life?" I shall, therefore, direct to them some observations on the particular duties they owe to society, because I think it suitable to this particular season, because it is of much more importance to tell men how they are to be Christians in detail, than to exhort them to be Christians generally; because it is of the highest utility to avail ourselves of these occasions to show to classes of mankind what those virtues are, which they have more frequent and valuable opportunities of practising, and what those faults and vices are to which they are more particularly exposed.

It falls to the lot of those who are engaged in the active and arduous profession of the law to pass their lives in great cities, amidst severe and incessant occupation, requiring all the facul-

ties, and calling forth, from time to time, many of the strongest passions of our nature. In the midst of all this, rivals are to be watched, superiors are to be cultivated, connexions cherished; some portion of life must be given to society, and some little to relaxation and amusement. When, then, is the question to be asked, "What shall I do to inherit eternal life?" what leisure for the altar, what time for God? I appeal to the experience of men engaged in this profession, whether religious feelings and religious practices are not, without any speculative disbelief, perpetually sacrificed to the business of the world? Are not the habits of devotion gradually displaced by other habits of solicitude, hurry, and care, totally incompatible with habits of devotion? Is not the taste for devotion lessened? Is not the time for devotion abridged? Are you not more and more conquered against your warnings and against your will, not, perhaps, without pain and compunction, by the mammon of life? And what is the cure for this great evil to which your profession exposes you? The cure is, to keep a sacred place in your heart, where Almighty God is enshrined, and where nothing human can enter; to say to the world, "Thus far shalt thou go, and no farther;" to remember you are a lawyer, without forgetting you are a Christian; to wish for no more wealth than ought to be possessed by an inheritor of the kingdom of heaven; to covet no more honour than is suitable to a child of God; boldly and bravely to set yourself limits, and to show to others you have limits, and that no professional eagerness and no professional activity shall ever induce you to infringe upon the rules and practices of religion: remember the text: put the great question really, which the tempter of Christ only pretended to put. In the midst of your highest success, in the most perfect gratification of your vanity, in the most ample increase of your wealth, fall down at the feet of Jesus, and say, "Master, what shall I do to inherit eternal life?"

The genuine and unaffected piety of a lawyer is, in one respect, of great advantage to the general interests of religion; inasmuch as to the highest member of that profession a great share of church patronage is entrusted, and to him we are accustomed to look up in the senate, for the defence of our venerable establishment; and great and momentous would be the loss to this nation, if any one called to so high and honourable

an office, were found deficient in this ancient, pious, and useful zeal for the established church. In talking to men of your active lives and habits, is it not possible to anticipate the splendid and exalted stations for which any one of you may be destined. Fifty years ago, the person at the head of his profession, the greatest lawyer now in England, perhaps in the world, stood in this church, on such occasions as the present, as obscure, as unknown, and as much doubting of his future prospects, as the humblest individual of the profession here present. If Providence reserve such honours for any one who may now chance to hear me, let him remember that there is required at his hands a zeal for the established church, but a zeal tempered by discretion, compatible with Christian charity, and tolerant of Christian freedom. All human establishments are liable to err, and are capable of improvement: to act as if you denied this, to perpetuate any infringement upon the freedom of other sects, however vexatious that infringement, and however safe its removal, is not to defend an establishment, but to expose it to unmerited obloquy and reproach. Never think it necessary to be weak and childish in the highest concerns of life; the career of the law opens to you many great and glorious opportunities of promoting the gospel of Christ, and of doing good to your fellow creatures; there is no situation of that profession in which you can be more great and more glorious than when, in the fulness of years, and the fulness of honours, you are found defending that church which first taught you to distinguish between good and evil, and breathed into you the elements of religious life; but when you defend that church, defend it with enlarged wisdom, and with the spirit of magnanimity; praise its great excellencies; do not perpetuate its little defects; be its liberal defender, be its wise patron, be its real friend. If you can be great and bold in human affairs, do not think it necessary to be narrow and timid in spiritual concerns; bind yourself up with the real and important interests of the church, and hold yourself accountable to God for its safety; but yield up trifles to the altered state of the world. Fear no change which lessens the enemies of that establishment, fear no change which increases the activity of that establishment, fear no change which draws down upon it the more abundant prayers and blessings of the human race.

Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. It becomes, then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others. However useful this practice may be for the promotion of public justice, it is not without danger to the individual whose practice it becomes. It is apt to produce a profligate indifference to truth in higher occasions of life, where truth cannot, for a moment, be trifled with, much less callously trampled on, much less suddenly and totally yielded up to the basest of human motives. It is astonishing what unworthy and inadequate notions men are apt to form of the Christian faith. Christianity does not insist upon duties to an individual, and forget the duties which are owing to the great mass of individuals, which we call our country; it does not teach you how to benefit your neighbour, and leave you to inflict the most serious injuries upon all whose interest is bound up with you in the same land; I need not say to this congregation that there is a wrong and a right in public affairs. I need not prove that in any vote, in any line of conduct which affects the public interest, every Christian is bound, most solemnly and most religiously, to follow the dictates of his conscience. Let it be for, let it be against, let it please, let it displease, no matter with whom it sides, or what it thwarts, it is a solemn duty, on such occasions, to act from the pure dictates of conscience, and to be as faithful to the interests of the great mass of your fellow creatures, as you would be to the interests of any individual of that mass. Why, then, if there is any truth in these observations, can that man be pure and innocent before God, can he be quite harmless and respectable before men, who, in mature age, at a moment's notice, sacrifices to wealth and power all the fixed and firm opinions of his life; who puts his moral principles to sale, and barter his dignity and his soul for the baubles of the world? If these temptations come across you, then remember the memorable words of the text, "What shall I do to inherit eternal life?" not this—don't do this; it is no title to eternity to suffer deserved shame among

men ; endure any thing rather than the loss of character, cling to character as your best possession, do not envy men who pass you in life, only because they are under less moral and religious restraint than yourself. Your object is not fame, but honourable fame ; your object is not wealth, but wealth worthily obtained ; your object is not power, but power gained fairly and exercised virtuously. Long-suffering is a great and important lesson in human life ; in no part of human life is it more necessary than in your arduous profession. The greatest men it has produced have been at some period of their professional lives ready to faint at the long and apparently fruitless journey ; and if you look at those lives, you will find they have been supported by a confidence (under God) in the general effects of character and industry. They have withstood the allurements of pleasure, which is the first and most common cause of failure ; they have disdained the little arts and meannesses which carry base men a certain way, and no further ; they have sternly rejected, also, the sudden means of growing basely rich and dishonourably great, with which every man is at one time or another sure to be assailed ; and then they have broken out into light and glory at the last, exhibiting to mankind the splendid spectacle of great talents long exercised by difficulties, and high principles never tainted with guilt.

After all, remember that your profession is a lottery, in which you may lose as well as win ; and you must take it as a lottery, in which, after every effort of your own, it is impossible to command success ; for this you are not accountable, but you are accountable for your purity ; you are accountable for the preservation of your character. It is not in every man's power to say, I will be a great and successful lawyer, but it is in every man's power to say, that he will (with God's assistance) be a good Christian, and an honest man. Whatever is moral and religious, is in your own power. If fortune deserts you, do not desert yourself ; do not undervalue inward consolation ; connect God with your labour ; remember you are Christ's servant ; be seeking always for the inheritance of immortal life.

I must urge you by another motive, and bind you by another obligation, against the sacrifice of public principle. A proud man, when he has obtained the reward, and accepted the wages of baseness, enters into a severe account with himself, and feels

clearly that he has suffered degradation; he may hide it by increased zeal and violence, or varnish it over by simulated gaiety: he may silence the world, but he cannot silence himself. If this is only a beginning, and you mean, henceforward, to trample all principle under foot, that is another thing; but a man of fine parts and nice feelings is trying a very dangerous experiment with his happiness, who means to preserve his general character, and indulge in one act of baseness. Such a man is not made to endure scorn and self-reproach; it is far from being certain that he will be satisfied with that unscriptural bargain in which he has gained the honours of the world, and lost the purity of his soul.

It is impossible in the profession of the law, but that many opportunities must occur for the exertion of charity and benevolence: I do not mean the charity of money, but the charity of time, labour, and attention; the protection of those whose resources are feeble, and the information of those whose knowledge is small. In the hands of bad men, the law is sometimes an artifice to mislead, and sometimes an engine to oppress. In your hands it may be, from time to time, a buckler to shield, and a sanctuary to save; you may lift up oppressed humility, listen patiently to the injuries of the wretched, vindicate their just claims, maintain their fair rights, and show, that in the hurry of business and the struggles of ambition, you have not forgotten the duties of a Christian, and the feelings of a man. It is in your power, above all other Christians, to combine the wisdom of the serpent with the innocence of the dove, and to fulfil, with greater acuteness and more perfect effect than other men can pretend to, the love, the lessons and the law of Christ.

I should caution the younger part of this profession (who are commonly selected for it on account of their superior talents), to cultivate a little more diffidence of their own powers, and a little less contempt for received opinions, than is commonly exhibited at the beginning of their career; mistrust of this nature teaches moderation in the formation of opinions, and prevents the painful necessity of inconsistency and recantation in future life. It is not possible that the ablest young men, at the beginning of their intellectual existence, can anticipate all those reasons, and dive into all those motives, which induce mankind to act as they do act, and make the world such as we find it to be;

and though there is, doubtless, much to alter, and much to improve in human affairs, yet you will find mankind not quite so wrong as, in the first ardour of youth, you supposed them to be; and you will find, as you advance in life, many new lights to open upon you, which nothing but advancing in life could ever enable you to observe. I say this, not to check originality and vigour of mind, which are the best chattels and possessions of the world, but to check that eagerness which arrives at conclusions without sufficient premises; to prevent that violence which is not uncommonly atoned for in after-life by the sacrifice of all principle and all opinions; to lessen that contempt which prevents a young man from improving his own understanding, by making a proper and prudent use of the understandings of his fellow creatures.

There is another unchristian fault which must be guarded against in the profession of the law, and that is, misanthropy, an exaggerated opinion of the faults and follies of mankind. It is naturally the worst part of mankind who are seen in courts of justice, and with whom the professors of the law are most conversant. The perpetual recurrence of crime and guilt insensibly connects itself with the recollections of the human race: mankind are always painted in the attitude of suffering and inflicting. It seems as if men were bound together by the relations of fraud and crime; but laws are not made for the quiet, the good, and the just; you see and know little of them in your profession, and, therefore, you forget them; you see the oppressor, and you let loose your eloquence against him; but you do not see the man of silence and charity, who is always seeking out objects of compassion: the faithful guardian does not come into a court of justice, nor the good wife, nor the just servant, nor the dutiful son; you punish the robbers who ill treated the way-faring man, but you know nothing of the good Samaritan who bound up his wounds. The lawyer who tempted his Master, had heard, perhaps, of the sins of the woman at the feast, without knowing that she had poured her store of precious ointment on the feet of Jesus.

Upon those who are engaged in studying the laws of their country, devolve the honourable and Christian task of defending the accused; a sacred duty never to be yielded up, never to be influenced by any vehemence nor intensity of public opinion.

In these times of profound peace, and unexampled prosperity, there is little danger in executing this duty, and little temptation to violate it; but human affairs change like the clouds of heaven; another year may find us, or may leave us, in all the perils and bitterness of internal dissension, and upon one of you may devolve the defence of some accused person, the object of men's hopes and fears, the single point on which the eyes of a whole people are bent. These are the occasions which try a man's inward heart, and separate the dross of human nature from the gold of human nature. On these occasions, never mind being mixed up for a moment with the criminal and the crime; fling yourself back upon great principles, fling yourself back upon God; yield not one atom to violence, suffer not the slightest encroachments of injustice, retire not one step before the frowns of power, tremble not, for a single instant, at the dread of misrepresentation. The great interests of mankind are placed in your hands: it is not so much the individual you are defending; it is not so much a matter of consequence whether this or that is proved to be a crime, but on such occasions, you are often called upon to defend the occupation of a defender, to take care that the sacred rights belonging to that character are not destroyed, that the best privilege of your profession, which so much secures our regard, and so much redounds to your credit, is never soothed by flattery, never corrupted by favour, never chilled by fear. You may practise this wickedness secretly, as you may any other wickedness; you may suppress a topic of defence, or soften an attack upon opponents, or weaken your own argument, and sacrifice the man who has put his trust in you, rather than provoke the powerful by the triumphant establishment of unwelcome innocence; but if you do this, you are a guilty man before God. It is better to keep within the pale of honour, it is better to be pure in Christ, and to feel that you are pure in Christ; and if the praises of mankind are sweet, if it is ever allowable to a Christian to breathe the incense of popular favour, and to say it is grateful and good, it is when the honest, temperate, unyielding advocate, who has protected innocence from the grasp of power, is followed from the hall of judgment by the prayers and blessings of a grateful people.

These are the Christian excellencies which the members of the profession of the law have, above all, an opportunity of cul-

tivating; this is your attribute to the happiness of your fellow creatures, and these your preparations for eternal life. Do not lose God in the fervour and business of the world; remember that the churches of Christ are more solemn and more sacred than your tribunals; bend not before the judges of the king, and forget the Judge of judges; search not other men's hearts without heeding that your own hearts will be searched; be innocent in the midst of subtilty; do not carry the lawful arts of your profession beyond your profession; but when the robe of the advocate is laid aside, so live that no man shall dare to suppose your opinions venal, or that your talent and energy may be bought for a price; do not heap scorn and contempt upon your declining years, by precipitate ardour for success in your profession; but set out with a firm determination to be unknown rather than ill-known; and to rise honestly if you rise at all. Let the world see that you have risen because the natural probity of your heart leads you to truth; because the precision and extent of your legal knowledge enable you to find the right way of doing the right thing; because a thorough knowledge of legal art and legal form is in your hands, not an instrument of chicanery, but the plainest, easiest, and shortest way to the end of strife. Impress upon yourselves the importance of your profession; consider that some of the greatest and most important interests of the world are committed to your care; that you are our protectors against the encroachments of power; that you are the preservers of freedom, the defenders of weakness, the unravellers of cunning, the investigators of artifice, the humblers of pride, and the scourgers of oppression; when you are silent, the sword leaps from its scabbard, and nations are given up to the madness of eternal strife. In all the civil difficulties of life, men depend upon your exercised faculties and your spotless integrity; and they require of you an elevation above all that is mean, and a spirit which will never yield when it ought not to yield. As long as your profession retains its character for learning, the rights of mankind will be well arranged; as long as it retains its character for virtuous boldness, those rights will be well defended; as long as it preserves itself pure and uncorruptible on other occasions not connected with your profession, those talents will never be used to the public injury, which were intended and nurtured for the public good. I hope you will weigh these observations, and apply them to the business of the ensuing week, and, beyond that, in the common occupations of your profession; always bearing in your minds the emphatic words of the text, and often in the hurry of your busy, active lives, honestly, humbly, heartily exclaiming to the Son of God, "Master, what shall I do to inherit eternal life?"

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TENANT BY THE CURTESY.

[We have pleasure in laying before our readers the following essay from a distinguished member of the bar in Virginia. Although the topic of it is treated with special reference to the laws of that commonwealth, the essay, we venture to think, presents some considerations which may arrest professional attention in every state. If the author's views are sound, our Pennsylvania opinions, on the subject treated by him, may be open to remark; and to them, in relation with this subject, we may hereafter endeavour to call the attention of our Pennsylvania readers.—*Eds.*]

TO THE EDITORS:

I lately had occasion to consider whether, in a case submitted to me, the surviving husband was tenant by the curtesy of his deceased wife's real estate. And in order to settle a judgment upon it, I found it necessary to examine a point of general interest. The accompanying paper discloses the course and result of the examination; which I send to you for publication, in the hope that it may be found of general utility.

Culpepper Co. Ho., Va.
August, 1846.

W. G.

It was well observed by a great judge,¹ that dower is a legal, an equitable, and a moral right, but that "the husband, on the contrary, has no right to a tenancy by the curtesy, but from positive institutions or provisions of the laws;" and that therefore it is "properly styled² a tenancy by the curtesy of England, that is, an estate by favour of the law of England." From which it follows, that it must be taken precisely as the law gives it, and no otherwise.

¹ Sir Joseph Jekyll, 2 P. Wms. 703, in *Banks v. Sutton*.

² 2 Woodes. Vin. Lect. 18.

Now by the English law, as it existed at the foundation of these colonies, since United States, and for a long time before—and as it has continued ever since—a husband cannot, in any case, be tenant by the curtesy of his wife's *land*, unless he, in her right, has been actually or virtually seised of it in deed, at some time during the coverture. It was decided by the supreme court of New York, in the case of *Jackson v. Sellick*,² that this doctrine did not extend to what in America are called, almost technically, *wild lands*; and that decision has probably governed the action of individuals and courts in all cases of a like kind, which have since arisen.³ It has also been decided in the same state,⁴ that the doctrine does not apply where the title of the wife is acquired by a conveyance, which under the statute of uses, passes the legal title and seisin to the grantee, without the necessity of an entry or other act, on her part, to perfect her estate; and probably this too will be a governing decision.⁵ But with these qualifications, if the latter be a qualification, grafted upon it, the English rule has been held to be the law of New York,⁶ Rhode Island,⁷ Kentucky,⁸ and probably other states.

In the recent case of *Mercer's lessee v. Selden*,⁹ the supreme court of the United States decided, that the same rule yet prevails in Virginia. But as *the point is one of great practical importance*, it may be worth while to inquire, whether it was so held upon sufficient deliberation.

Judge Tucker (in his Commentaries on the Laws of Virginia)¹⁰ makes no doubt of it; and such has been the general, perhaps it may be safely said, the universal opinion of the profession within the state. But judge Swift (in his System of the Laws of Connecticut),¹¹ made just as little doubt that such was the law of that state; and so it is said to have been *held* there, in two cases

¹ In accurate technical phraseology, this is a seisin in the husband and wife (as one person) in right of the wife. See 1 Dougl. 320, *Polyblank v. Hawkins*; 16 Pick. 161, *Melvin v. Proprietors of Locks and Canals on Merrimack River*.

² 8 Johns. Rep. 262.

³ See 1 Pet. S. C. Rep. 506, *Davis v. Mason*; 17 Pet. S. C. Rep. 68, 69, *Mercer's lessee v. Selden*; 1 How. S. C. Rep. 37, S. C.

⁴ 3 Hill 182, *Adair v. Lott*.

⁵ See Tuck. Comm., B. 2, p. 58, edit. 1836.

⁶ 5 Cow. 74, *Jackson v. Johnson*; 8 Paige 643, *Ellsworth v. Cook*.

⁷ 1 Sumn. 263, *Stoddard v. Gibbs*.

⁸ 6 Monr. 179, *Adams v. Logan*.

⁹ 17 Pet. S. C. Rep. 61; S. C. 1 How. S. C. Rep. 37.

¹⁰ B. 2, p. 57.

¹¹ Vol. 1, p. 252.

that were decided in the superior court.¹ Yet it is perfectly settled, by subsequent adjudications, that the law of that state is, and at the time of judge Swift's composing his work, was, exactly the reverse; and what is more, it was so settled with the concurrence of judge Swift himself.

The first of these decisions was made by the supreme court of errors, in the case of *Bush v. Bradley*,² the grounds of which will appear in the following extract from the opinion delivered by judge Reeve; in reciting which, I have thought it expedient to introduce some observations upon the agreement and disagreement of the Virginia law with that of Connecticut, upon certain points of the latter, as stated by him.

"As to the point respecting the curtesy (said he), there is no question but what there must have been, by the English law, an actual seisin of the wife, of the premises, during the coverture, to entitle the husband to the curtesy. It is said, that unnecessary departures from the common law of England are not to be favoured—that by such means, every thing is rendered uncertain. I am fully of opinion, that few maxims of our law are more important than that of *stare decisis*; but it must be acknowledged by all, that our system of law respecting real property is, in many instances, very different from the English system. We have in some instances, where we have adopted the principles of the English law, extended them to cases which, by the adjudications of the English courts, have not been supposed to fall within the governing principle; in others we have adopted entirely different principles: and in all such cases where this has been done, which are *pari ratione* with those already settled, if we reject our own and adopt their's, we shall mar the symmetry of our law; and the preservation of symmetry in our system, I also view as a most important consideration. In England, it is not sufficient that a man is proprietor of real property and has a perfect right to it when he dies, to cause it to descend to his heirs at law. No: he must be [*read have been*] actually seised thereof. The maxim is *seisina facit stipitem*, and the person that is heir to that property will be heir to him that was last seised. If A. should die, who owns Whiteacre, which descended to him from his father, but has not been actu-

¹ See 4 Day 301.

² Ib. 298.

ally seised, leaving a brother of the half-blood, B., and a sister, C., of the whole blood, this estate cannot descend to C. his sister, and [*his*] heir—for B. being of the half-blood, cannot by their law inherit to his brother; but yet the same will descend to B., who is heir to his father, who was the last seised. Had A. been seised, the estate would have descended to C. The maxim of *seisina facit stipitem*, is an unyielding maxim of their law, and what governs the descent of property. But this is not our law. It is settled [in this state], that it shall descend to the heirs of him who owns the property, whether he was seised or not. [And so it is in Virginia, by *statute*.]¹ Seisin directs the descent with them; ownership with us. By the English law, a devise will not operate upon real property, of which the devisor is disseised. Seisin is an indispensable requisite to give effect to the devise. A devise by our law [and also by the *statute* law of Virginia]² is good, although a man is disseised. Seisin is necessary in their law; and nothing but ownership in our law. We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder; but by the English law, actual possession by entry is necessary. [In this respect the law of Virginia, being unaffected by *statutory* provision, agrees with the English law.]³ We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession as much as in the other case; and whenever a right of possession is lost, all title and ownership is lost. So the statute of limitations respecting lands, has always been construed. The statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry; and yet this statute has been always considered as barring all claim of title, whilst the same words in the English statute have been considered not as having any effect on the title, but only on the right of entry, and the lands may be recovered by a form of proceeding proper for such a case. [In this respect also, the law of Virginia agrees with that of England.]⁴ The English law distinguishes betwixt a right of possession and a right of property, but our law does

¹ 1 Lom. Dig. 594.³ 3 Lom. Dig. 20.² 6 Rand. 8, Cooke v. Thornton; id. 556, Truss v. Old. ⁴ 1 Lom. Dig. 619–621.

not. Wherever there is a right to real property, there is of course [in Connecticut] a right of possession, and the statute, which takes away the right of possession, takes away the right of property; and this is the reason, that this statute has received a construction altogether different from the construction given to the English statute. And this is perfectly analogous to every other case of real property in this state. Wherever you find a right of property, you find a right of possession, and all the consequences of ownership attending it, that you find in England, where there is an actual seisin; and, on the other hand, where there is no right of possession, there is no ownership. So in this case, Mary Goldear had title to the land, and though not actually seised, her husband acquired the same rights on her death, as if she had been seised. Since seisin is not necessary in case of descent to the heirs, neither is it necessary to pass lands by a devise,—why should it be thought necessary to the husband's title by the curtesy? The decision of the court in this case is no departure from fixed rules and precedents. The English rule respecting the efficacy of seisin, has long since been departed from; and to adhere to it in this case, would mar the symmetry of our law."

In this opinion, Mitchell c. j., and Swift, Trumbull, Baldwin, J. C. Smith, and N. Smith, justices, concurred. Brainerd and Edmond, justices, without assigning their reasons, dissented; but the decision of the majority has been followed and confirmed in the subsequent case of *Kline v. Beebe*.¹ And no doubt, by these determinations and the long acquiescence under and conformity to them, the law has become so perfectly settled in that state, that it would be wrong to disturb it again: For this is one of those points, in regard to which it matters little how the law is settled, provided it be settled; while it is of very great importance, that it should not be fluctuating. But since it had been understood to be otherwise prior to the decision of the supreme court of errors in the case of *Bush v. Bradley*, and that former opinion had been made the basis of judicial action in some cases, the reasons which have been quoted seem scarcely sufficient to justify the determination which was founded upon them; and especially to judge Swift, they should have appeared

¹ 6 Conn. Rep. 494.

inadequate, after he had himself, in the work before mentioned, pointed out, in some very sensible remarks, the exceedingly *whimsical* nature of this estate by the curtesy. It is founded (says he), "upon a singular principle, the capacity of the parents to have children, and the circumstance of their being born alive. It would be more rational to say, that the husband should hold, during life, the lands of the wife after her death, whether they had issue or not—or, that he should hold them, in case the issue survived her, and it was necessary to have the improvement of the lands for their education and support: But that the circumstance that the child be born alive, whether it live one moment or not, should be the event on which the estate depends, is one of those unaccountable whims, which are sometimes adopted by accident, and continued by the authority of precedent. It is still more extraordinary, that the husband should be defeated of the estate, if the child be delivered by the cæsarean operation: for there is precisely the same reason, why the father should have the estate of the mother for the education of children delivered by this mode, as the common mode."¹ And the effect of these reflections would have been heightened by attending to the extract from St. Germain, with which I shall close the present discussion.

From what has been said it is plain, that although the decision of the supreme court of errors may have been necessary towards preserving the "symmetry" (if in this respect it was worth preserving) of the law of Connecticut, yet such a decision neither is necessary to that end, nor would accomplish it, in Virginia; and therefore *the reasoning upon which that decision was founded, would certainly not justify a similar decision in the latter state.* But the learned counsel for the successful party, in the case of *Bush v. Bradley*, did not put the argument on any such ground. According to the printed report, they said: "We lay down this proposition, that the husband is tenant by the curtesy of all the estate which any issue born of the wife during the coverture, would be capable of inheriting"—the very point which it was necessary for them to *prove*,² and in support

¹ 1 Swift's Syst. 253.

² In one sense, the proposition is sustained by ample authority, which it would be easy, and might seem pedantic, to quote; but, in the only sense in which it could be of any service to the counsel, it was a proposition that required proof.

of it they argued as follows: *The only reason why seisin is necessary by the English law, is, that the issue may be capable of inheriting*; it being a rule of that law, that no one can be heir to the ancestor of any land, whereof the ancestor was not actually seised; 1 Cruise's Dig. 113. If, then, the issue can inherit without seisin in the ancestor, such seisin is unnecessary in order to constitute a tenancy by the curtesy. But it has been solemnly decided by this court, in the case of *Hillhouse v. Chester*, 3 Day 166, that seisin is unnecessary in order to transmit an estate by descent." *Ergo*, the conclusion. And if the first position in their argument be true, then, the last being so both in Connecticut and in Virginia, the conclusion seems to be inevitable, that in neither of those states can actual seisin during the coverture, be a necessary prerequisite to the title of tenant by the curtesy—*unless* this case be out of the operation of the maxim, *cessante ratione legis unica cessat et ipsa lex*.

In a note, which will be presently cited from Lomax's Digest, the able author of it seems to think that the case is a fit one for the application of the maxim; and his opinion is entitled certainly to very great respect. But it rather seems to me, that the maxim has been heretofore used only to indicate, not when an acknowledged rule of law shall cease absolutely and become extinct, but how far, while it exists, it shall extend, and in what cases it shall take effect. In other words, it indicates, not the duration but the operation (while they endure), of the rules of law. This remark is true of all the instances which are adduced in Broom's Maxims 68–70, under this head, and likewise of all those which are adduced in Wingate's Maxims 29–38, under the maxim *cessante causa, cessat effectus*; which is evidently treated there as the same maxim in effect. So considered, it is akin to another maxim, *ubi eadem ratio, ibi idem jus*, or as it is sometimes said, *ibi eadem lex*; and of the two a third might be compounded, which perhaps would be more perfect, than either of them taken singly; viz. *ubi eadem ratio, ibi eadem lex*; *cessante ratione, cessat et lex*. At present no instance is remembered, in which an acknowledged rule of law has ceased to exist, while any subject has remained on which it could operate, only because the reason on which it was first introduced, has ceased; but some remarkable instances to the contrary suggest themselves. Most lawyers will at once

think of the powerful and convincing argument of Mr. Fearn, against treating the rule in Shelley's case as obsolete, even if it were conceded that all the reasons on which it was founded, had ceased.¹ So, the only reason originally, why a distress for rent was incident to the reversion, was, that the tenant owed fealty to the reversioner; fealty is abolished in America, and yet the right to distrain still continues incident to the reversion, and of common right exists only where there is a reversion.² And so (not to multiply examples further), though every imaginable reason for attributing more efficacy to a sealed instrument, than to the same instrument with the signature but without the seal of the party, has long ago ceased, yet no one will venture to say that the numerous rules of law founded upon that difference, or any of them have ceased, further than as they have been actually abolished by the legislature.³ But, I confess, these are only my first thoughts upon a point which I have never before considered, and upon which I think it immaterial to form any settled judgment at present.

For it seems to me, that the discussion in which I have engaged, may be brought to a satisfactory close, upon the other and *main question; which is, whether the first position in argument of the Connecticut counsel before quoted, is true.*

In 1 Lom. Dig. 64-65, the following passage occurs: "The reason for requiring this seisin in fact [of the wife] is (as has been said), to entitle the heir to take the estate from her in that character, which is essential to the husband's title. For it is a rule of the English law of descents, that the heir claiming by descent must derive his title from the person last actually seised of the inheritance. If, therefore, the wife was not so seised, he could not inherit from her, and consequently, one of the requisites of the husband's title to curtesy would be wanting, viz. having issue that would inherit the estate from the wife. To which passage, judge Lomax appends this note: "If the reason of this rule which requires seisin in fact, has its

¹ See Butl. Fearn. 67-89.

² Tuck. Comm., B. 2, p. 14-18; 1 Lom. Dig. 547, 548.

³ On this subject of seals, some very nice and curious doctrine was laid down (I am told), by the Virginia court of appeals, in the case of *Pollock and Wife v. Glassell*, which will probably be reported in the second volume of *Grattan's Reports*.

foundation in the maxim of the English law of descents, *seisina facit stipitem*, then it would seem to follow, that the Virginia law of descents, having repealed that maxim, has dispensed with actual seisin as essential to the husband's title to curtesy. If that title fails, *solely* upon the ground of the incapacity of the issue by the marriage to inherit, the rule, to be consistent, would sustain the title to curtesy, wherever there had been a seisin in the wife, such as would make the issue inheritable to her estate. The disqualification of the husband's title should only be commensurate with the inheritable incapacity of the issue by the marriage, and should be confined to such cases. It is equally requisite, as we shall hereafter see, in the law of *dower*, that the issue by the marriage should be capable of inheriting to the husband, in order that the title to dower should be sustained. So far as the maxim referred to in the law of descents can have any operation, it would equally apply to the law of dower, as to the law of curtesy; and precisely the same seisin is necessary to make the husband the root of the descent to the issue of the marriage, as would be required in regard to the wife. The issue could no more inherit from the one than from the other, if there had been only a seisin in law in that ancestor from whom the descent was claimed. The law would seem to be inconsistent with its own purposes, if it could allow a seisin in law in the one case to be sufficient, when a seisin in fact is required in the other, *if* it has based its rule *merely* upon the principle of the inheritable capacity of the issue, as that capacity may be affected by the nature of the seisin. Nor would the reason of the rule seem to make it necessary, that the wife or rather the husband and wife, should have been seised of the estate of the wife, *during* the coverture. A seisin of the wife at any time, whether *before* or during the coverture, would be sufficient to make her the root of the descent; and the issue might equally claim as heir from the deceased wife, who was the ancestor last actually seised. As her seisin before coverture would give the issue a complete title in the character of her heir, it would seem difficult to explain why the husband should not be entitled to curtesy [as he would not be—in case she had also been disseised before the coverture, and the seisin had not been restored before the coverture was terminated], *if* seisin were referred to *merely* because of its influence upon the in-

heritable capacity of the issue. Notwithstanding the high authority, which sanctions the reference to the maxim of the law of descents, as the foundation of the rule requiring seisin in fact to give a title to the curtesy, it seems questionable whether it is not to be sought for in some other principle of policy; and if so, the rule of the common law of curtesy remains unchanged by the alteration which has been made in the law of descents of Virginia."

Of these very striking remarks, perhaps those which relate to the law of dower may be shown to be inconclusive and even inapplicable, by referring to the distinction between curtesy and dower, which I mentioned in the beginning, and numerous other distinctions between them, but chiefly by referring to that distinction between the husband and the wife—*sub potestate viri*—which is mentioned in connexion with this subject, by so many writers, ancient and modern,¹ and by judge Lomax himself. "There is no necessity (says he), of a seisin in fact, as in the case of curtesy; for a seisin in law will be sufficient, otherwise it would be in the husband's power, either by his negligence or malice, to defeat his wife of that subsistence after his death, which the law has provided for her, and *she* cannot enter to gain a seisin in her own right, as *he* may do into lands descended to her in order to entitle himself to curtesy."² But without stopping to consider whether in this or in any other way that portion of his note would be sufficiently answered, it seems certain that the residue of the remarks contained in it is so far unanswerable, as to outweigh *any* modern authority, which "sanctions the reference" he speaks of. He does not indeed *cite* any; for though he mentions *Doe v. Hutton*, 3 Bos. & Pull. 643, yet neither in that case, nor in *Buckworth v. Thirkell*, as reported in the note to it, or in 1 Coll. Jur. 332,³ or in 4 Dougl. 323, is there mentioned any *dictum* of judge, counsel, or reporter, that does refer the doctrine to any source whatever. And therefore it is a gross mistake of Mr. Roper, to say, as he does:⁴ "In all cases where actual seisin by the wife can be ac-

¹ Bro. Abr., tit. Dower, pl. 75; Co. Lit. 31 a, Baron and Feme 79, 1st edit.; 2 Blackst. Comm. 131; Laws Respecting Women 197, 198 (a book much commended by Mr. Preston; 1 Abstr. 229, 230); Clanc. Husb. and Wife 198, 3d edit.; 1 Rop. Husb. and Wife 352; Jacob's edit. Lamb. Dow. 8; Tuck. Comm., B. 2, p. 61.

² 1 Lom. Dig. 78.

³ P. 247, Dubl. edit.

⁴ Husb. and Wife, vol. 1, p. 7.

quired, as of lands and tenement, it must be obtained in order to found the husband's claim to the curtesy. The reason is to enable the heir to take the estate from her in that character, which is essential to the husband's title; for it is a rule of law, that the heir, claiming by descent, must derive his title from the person last actually seised of the inheritance. If, therefore, the wife was not so seised, he could not inherit it from her; so that one of the requisites of the husband's title to curtesy would be wanting, viz. issue that could inherit the estate by descent from the wife. *The reader will find this subject fully and ably discussed and explained in the case of Doe v. Hutton, decided in the court of common pleas, and reported in Bosanquet & Puller's Reports, vol. 3, p. 643.*" It is true, that the case cited contains a copious and learned discussion of the maxim of descents, *seisina facit stipitem*, and more particularly of the rule founded upon it, *possessio fratris de feodo simplici facit sororem esse hæredem*, both of which are touched in the extract which has been given from the opinion of judge Reeve; but in no part of the report is there a hint dropped of any connexion between that doctrine, and the rule concerning curtesy, which we are now considering. But besides the passage from Roper just quoted, judge Lomax might have cited Baron and Feme 74; 2 Blackst. Comm. 128, (a passage which it may be worth while to observe, judge Tucker has *not* transcribed into his Commentaries);¹ Laws Respecting Women 165; Clanc. Husb. and Wife

¹ But which shall be here set down—at large—for the sake of the reflection with which it concludes. After stating that "in general there must be issue born, and such issue as is also capable of inheriting the mother's estate," our author proceeds: "And this seems to be the principal reason why the husband cannot be tenant by the curtesy, of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one by the standing rule of law can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy (Co. Lit. 40). *And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating and demonstrating, one another.*" A reflection most misplaced, if the demonstration furnished in the text be as complete as I think it is, to prove that the two rules here spoken of are *not* "connected" at all, much less interwoven together.

181, and (*instar omnium*), the great name of sir Edward Coke, who makes that statement both in his commentary on Littleton, fol. 40, a.; and in the report which, while chief justice of the court of common pleas, he published of Paine's case, 8 Rep. 36, a. And perhaps this last is the "high authority," which he had in his contemplation.

It is indeed, *clarum et venerabile nomen*, and most deservedly held in such high estimation, as ordinarily to deter any man, who knows what reverence is due, and by the learned paid to it, from calling in question, for the first time, any doctrine which *it* can be vouched to maintain. And in the present case, the danger to him that does so, is enhanced by the fact, that this particular doctrine has been received without question, on the part of his very learned and diligent editors, both of the Institutes and of the Reports, on the part also of the more numerous editors of Blackstone's Commentaries, and on the part of most (if not all) others, (until it was modestly questioned by judge Lomax, in the manner we have seen), and propagated by succeeding writers as true, down even to the present day. For besides those already mentioned, of whom one at least is himself a great authority, it has been also laid down, and argued upon as unquestionable law, and leading (under the recent English statute of descents) to new and important conclusions, by an English writer later even than judge Lomax.¹

Under all these discouragements—yet in the humble hope of demonstrating THE TRUTH—I venture to deny utterly this doctrine of sir Edward Coke; and consequently the position (of counsel in *Bush v. Bradley*)—on which (as before stated), the main question depends.

It is emphatically sir Edward Coke's doctrine. It was never hinted by any one before him. In his commentary on Littleton, he cites no authority for it, but his own report of Paine's case; and in that he cites no authority for it at all. For the year books there mentioned² are cited to prove that "the issue ought to make himself heir to him who was last actually seised,"

¹ See Williams on Real Property 168, 169.

² 11 Hen. 4, 11; and 40 Edw. 3, 9; see note, *postea*, p. 499.

—as Mr. Hargrave has observed,¹ and they could not have been cited to prove anything more, as appears upon a careful examination I have made of them. And as the doctrine was first suggested in his report of Paine's case, so upon comparing that with the better reports of the same case, in 1 And. 184; 1 Leon. 167; and Gouldsb. 81; and reflecting upon his manner of reporting in general, it seems altogether unlikely that it was suggested by any one concerned in that cause, either upon the bench or at the bar. For the case having been argued by serjeants at law, in the court of common pleas, about the middle of the reign of queen Elizabeth, it is certain that he was not engaged in it. And taking it to be his own doctrine, it appears to be one instance of that "attempting to give reasons for every thing," which lord Mansfield took notice of, and censured in him,² and which, in regard to this particular subject, as we shall see in the sequel, was condemned in advance by an able author, who wrote long before his time.

Judge Lomax has shown, that by the English law, the issue of the marriage may, in one familiar instance, take by descent from his mother, lands in which, for want of seisin in fact during the coverture, his father cannot claim an estate by the curtesy. Other less familiar examples to the same effect might be added, but to avoid wearying the reader, only one shall be mentioned, and that shall be taken from Coke on Littleton, fol. 29, b: "If a woman, tenant in tail general, maketh a feoffment in fee, and taketh back an estate in fee, and take a husband, and hath issue, and the wife dieth, the issue may in a formedon recover the land *against his father*, because he is to recover by force of the estate *tail*, as heir to his mother, and is not inheritable to his *father*" (a mistake, as it seems, for his "*mother*, as tenant in fee *simple*."*) The *rationale* of which, if it be not obvious enough, is explained in Mr. Hargrave's note to the passage, and in Mr. Thomas' extract,³ from the *first* edition of Prest. Est. 519.

But what seems more to the present purpose, by the same law (and here I beg to be understood throughout this discus-

¹ Co. Lit. 40, a, note 2.

² See Butl. Remin., part 1, art. 11, sect. 1, p. 108, edit. New York, 1825; 1 Rosc. Brit. Lawy. 265, edit. Philad., 1841.

³ 1 Thom. Coke 561, note 12.

sion, when speaking of the English law of descents, as meaning that law *prior* to the recent alterations in it by statute), in some cases the husband shall be tenant by the curtesy, where the issue of the wife shall not inherit *as heir to her*, and shall *not so inherit*, for no other reason than the want of this very requisite of actual seisin. To prove this let us again resort to that great repository of the law of real property, the Commentary on Littleton; in which sir Edward Coke puts the following case, or rather cases: "A man seised of an advowson or rent in fee, hath issue a daughter, who is married and hath issue, and dieth seised, the wife before the rent became due, or the church became void, dieth, she had but a seisin in law and yet he shall be tenant by the curtesy."¹ And with this, numerous other authorities *accord*.² But the issue of the marriage, *because* the wife "had but a seisin in law," shall not *as heir to her*, take either the advowson or the rent; as shall be presently made amply to appear.

The reason, why in these cases the husband shall be tenant by the curtesy, which sir Edward Coke and most others have assigned, is, "because he could by no industry attain to any seisin, *et impotentia excusat legem*."³ But the author of the tract in the New Abridgment, commonly called Bacon's, under the title "Curtesy of England," and who was probably lord chief baron Gilbert, after noticing this as the reason given in "the books," proceeds to say: "But the true reason is, that the wife hath these inheritances which lie in grant, and not in livery when the right first descends upon her; for she hath a thing in grant, when she hath a right to it, and nobody else interposes to prevent it."⁴ Perhaps judge Tucker (who has omitted to transcribe what sir William Blackstone writes on *this* point also), thought this latter to be what the author just quoted called it, "the true reason," and *therefore* wrote, "there is a distinction

¹ Co. Lit. 29, a.

² Y. B. 7 Edw. 3, 66, a, b, and 3 Hen. 7, 5, a, cited *ibid.*; and in 1 Rep. 97, b, 98, a, *arguendo* in Shelley's case; and in 6 Rep. 68, a, Finch's case; and abridged in Fitzh. Abr., tit. Barre, pl. 293; and tit. Descent, pl. 3; and in Bro. Abr., tit. Tenant per le Curtesy, pl. 5, 9; Keilw. 104, b, pl. 13; Anon. F. N. B. 149, D.; Dod. Advows. 21; 2 Sid. 110-117, Deltick v. Bradburne.

³ Co. Lit. 29, a; Baron and Feme 74; 2 Blackst. Comm. 127; Laws Respecting Women 164; Clanc. Husb. and Wife 181; 1 Rep. Husb. and Wife 17.

⁴ Bac. Abr., tit. Curtesy of England, c. 2.

between such inheritances as are susceptible of a seisin in fact, and those which are not. Of the former, such as lands, there must be an actual seisin or possession; but of the latter, such as a rent, a seisin in law is sufficient."¹ Perhaps, however, he only meant to go as far as Mr. Preston before him, and judge Lomax since have gone; the former of whom says: "the wife, or the husband in her right, must have a seisin in fact and not a mere seisin in law, except in *those cases in which*, as advowsons, &c., *the husband cannot by any industry, obtain a seisin in fact.*"² And the latter says: "where the inheritances lie in grant, *so as* to be incapable of the same seisin as lands and tenements, actual seisin by the wife during the coverture cannot be required;" of which the *example* he gives is precisely the same that has been already quoted from Co. Lit.³ It is probable, therefore, that he and Mr. Preston, and perhaps judge Tucker, meant not to carry the doctrine beyond the limits set to it by sir Edward Coke, and within which only it is sustained by the principal authorities. But if they meant to go as far as the broadest interpretation of their words would carry us, their doctrine would be fully sanctioned by two sections (468, 469) of Perkins, which none of them have quoted, and which are in the following words: "If there be father and daughter, and the father is seised of an advowson in gross in fee, the daughter taketh a husband, and the father dieth, so as the advowson descendeth unto the daughter, and the daughter hath issue by her husband, and dieth before that the advowson doth become void, yet the husband shall be tenant by the curtesy. *And notwithstanding that the advowson doth become void during the coverture, and the wife dieth after the six months past, and before any presentment made by the husband, &c., so as the ordinary doth present, for lapse, under this avoidance, yet the husband shall present unto the next avoidance as tenant by the curtesy, &c.* If a rent do descend in fee unto a married woman, and she dieth before any day of payment, yet the husband shall be tenant by the curtesy of the rent, notwithstanding that there was not any seisin of the same rent during the coverture betwixt them. *And notwithstanding that the day of payment of the rent incurred in the life of the wife, and the*

¹ Tuck. Comm., B. 2, p. 58.

² 3 Abstr. 381.

³ 1 Lom. Dig. 66, 67.

wife dieth before any demand of the rent made by the husband, yet the husband shall be tenant by the curtesy, &c." Upon which it may be observed, 1. that Perkins distinctly carries the doctrine in favour of the husband, further than sir Edward Coke; 2. that for that excess it is questioned by Mr. Hargrave,¹ by Mr. Muchall,² and by Mr. Roper;³ though Mr. Clancy states the conflict, without indicating any leaning of his own to either side;⁴ and 3. that *such excess MAY be true, though the reason given in Bacon's Abridgment be false, but cannot be false, if the other be true.* For that reason means (if anything at all to the purpose for which it was adduced), that of inheritances which lie in grant as soon as they descend to the wife, she has *ipso facto* full possession and that perfect will, which is defined to be *juris et seisinæ conjunctio*, unless her possession be *de facto* disturbed by an adversary. But in this sense the position is certainly false; for if such were the law, inheritances of that description would descend upon the death of the wife, who had obtained *no other* seisin, to *her* heirs at law—the contrary whereof is true. And indeed, Perkins in the passage just quoted from him, may be cited as an authority against the position, so understood; for in the case of the rent, he says expressly, that "there was not any seisin of the same, during the coverture."

That in the cases put by sir Edward Coke, of the advowson and the rent, the same would descend not to the wife's heir, *as such*, but to the heir of her father, as the person last actually seised, would seem to be clear enough, on principle, if it were not for the doctrine suggested in the passage cited from Bacon's Abridgment; but if such a passage had never been written, or discovered, in a discussion like the present I should have thought it proper to fortify this important position by authorities in point. Accordingly, such have been sought and found. According to Fitzh. Abr., tit. Descent, pl. 3; Bro. Abr., tit. Descent, pl. 32; and Roll. Abr., tit. Descent, K., pl. 10,⁵ it was so decided in the case, which is reported in the Y. B., 3 Hen. 7, 5, a, pl. 19; though in the last edition (A. D. 1679), probably from an imper-

¹ Note 5 to Co. Lit. 29, a.

² Dr. and Stud., dial. 2, ch. 15, n., 18th ed.

³ 1 Husb. and Wife 17.

⁴ Clanc. Husb. and Wife 181.

⁵ See also Roll. Abr., tit. Descent, K., pl. 11.

fection of the point, that does not *distinctly* appear in the year book itself. There it stands as follows—substituting for the original, so far as it is perfect, a literal translation: “One seised of an advowson, in gross, had issue a son and a daughter by one venter, and a son by another venter, and died; his eldest son died before any presentment by him had. And it was argued, if the daughter should have it, or the brother. And it was touched, that the brother should have it. And of the other part, it was touched that the daughter (feme) should have it, because if she was seised of rent, and took baron, he should be tenant by the curtesy of England, *nienobstant l'avows et nemy la fil, &c.*” These last words leave the sense incomplete, but they seem to mean that it was held by some person or persons, that the youngest son should have the advowson as heir to his father, and not the sister as heir to her brother; and so the case has been understood by all the abridgers. And that it was so decided, there can be no reasonable doubt; for Fitzherbert, who was a contemporary, and whose account of the case in some respects is evidently taken from another source, states, with minute particularity, that it was so held by “three of the justices.” As his account is also short, I will give a literal translation of the whole of it: “If a man [be] seised of an advowson, in gross, and have issue a son and a daughter by one venter, and a son by another venter, and die, and the eldest [son] die; three of the justices held that the puisne son shall have the presentment, because there was not a presentment in the eldest: and others [that is, those “of the other part,”] said, if a feme seised of rent take baron, he shall be tenant by the curtesy before possession of the rent, so here, &c.” And according to that decision is the law, as stated in several other books;¹ which is confirmed by the settled and unquestionable law, in the strictly analogous but more common cases of remainders and reversions.²

These authorities I *expected* to find, but I was certainly much surprised to meet with the following, which is furnished by sir Edward Coke himself. It occurs in his comment upon the beforementioned rule of *possessio frateris*.³ “If a rent or an

¹ 3 Rep. 41, b, Ratcliffe's case; Co. Lit. 11, b; Dod. Advows. 21; 1 Show. 245-6, *arguendo* in Kellow v. Rowden.

² See Burton on Real Property 105, 106; Butl. Fearn. 561.

³ Co. Lit. 15, b.

advowson do descend to the eldest son, and he dieth before he hath seisin of the rent [which must mean a seisin in fact, since the very descent gives him a seisin in law], or present to the church, the rent or advowson shall descend to the youngest son, for that he must make himself heir to his father [the person last actually seised], as hath been oftentimes said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. *And this case DIFFERENT from the case of the tenant by the curtesy, for there if the wife dieth before the rent day, or that the church become void, because there was no laches or default in him, nor possibility to get seisin, the law, in respect of the issue begotten by him, will give him an estate by the curtesy of England. But the case of the descent to the youngest son, STANDETH UPON ANOTHER REASON, viz. to make himself heir to him that was last actually seised, as hath been said."*

It is very remarkable, that after writing this, he should, in the same work, and only a few pages later, have written, "except the wife be actually seised, the heir shall not (*as hath been said*) make himself heir to the wife; and THIS IS THE REASON that a man shall not be tenant by the curtesy of a seisin in law."¹ And it is almost equally remarkable, that such editors as he has had, should not have been struck with the gross and glaring inconsistency of the two passages; which, now that they are brought into close juxtaposition, must (it is supposed) be immediately apparent.

But, however that may be, since it has been shown, 1. that in many cases the issue may inherit *as* heir to the wife, *as the person last actually seised*, when nevertheless, for want of such actual seisin *during the coverture*, the husband cannot claim to be tenant by the curtesy; and 2. that in many cases, on the other hand, the husband may be tenant by the curtesy, when nevertheless, because *the wife was not the person last actually seised*, the issue cannot inherit *as* heir to her; it seems to be absurd any longer to maintain what, let it be borne in mind, was never suggested till the time of sir Edward Coke, that the maxim (as it is called by St. Germain in a passage to be presently quoted), which requires actual seisin during the cover-

¹ Co. Lit. 40, a.

ture, in some cases, but not in all, to make a man tenant by the curtesy, has any connexion whatever with the maxim of the law of descents, which requires, in all cases without exception, that the heir shall be heir to the person last actually seised.

And therefore, as the result of all that has been said, *it seems that we may confidently rest in the conclusion*—That by the law of Virginia, as by that of England, the husband, to entitle himself as tenant by the curtesy, must have been, during the coverture, actually or virtually seised in deed, in all cases except only those, in which, as exceptions to the general rule, it can be shown, by express authority, that such seisin is dispensed with. Of this, if there be any who still doubt, it is probable that their doubts will be removed, upon perusing some further observations, which, as being useful in other respects, I shall communicate, if leisure serve, hereafter, but have forborne to introduce here, because the present argument would have been needlessly (as it was thought), encumbered by them.¹ And I

¹ Besides the alleged reason for the rule in question, which we have now been considering, sir Edward Coke seems to assign, or at least to suggest another, in his report of Paine's case, 8 Rep. 36, a. The whole (very curious) passage is as follows: "And where Littleton [sect. 52] saith, *as heir to the wife*, these words are very material; for that is the *true* reason, that a man shall not be tenant by the curtesy of a seisin in law, for in such case the issue ought to make himself heir to him who was last actually seised &c., *vide* 11 Hen. 4, 11; 40 Edw. 3, 9, &c. And the tenant by the curtesy shall be attendant to the lord paramount, which he cannot be, because the wife died before she was actually seised: but tenant in dower shall not be attendant to the lord paramount, but to the heir, and therefore she shall be endowed of a seisin in law." Now, in this passage it was—or it was not—intended to suggest an additional reason, besides the one first assigned. If such was the intention, it seems strange that the first was called the "true" reason; for the second is certainly noway dependent upon it, but altogether sufficient by itself, if it be true. And if it be so, then it furnishes aid to the arguments urged in the text, in opposition to the first as the true reason. At the same time, if this be that "other principle of policy," in which (to use judge Lomax's expression), "the foundation of the rule" is to be sought; it would be easy to demonstrate, that the rule itself (like so many other rules growing out of, or connected with, the *feodal* system), is unaltered in Virginia, notwithstanding the *allodial* character at this day of all real property in that state. In the text I have made no remark upon this suggestion, for that reason partly—but principally because the suggestion itself (supposing it to have been intended), has been ever since (so far as I have learned), utterly unheeded, not only by others, but even by sir Edward Coke himself, who did not transfer it into his Commentary on Littleton, along with what he calls "the true reason." And this leads me to observe, that by the use of that expression he seems to have condemned the suggestion even in the moment of making it, if he designed

shall appropriately terminate it by transcribing (because the book is scarce), the whole of the remarks made upon this subject, with so much learning, judgment, and good sense, by Christopher St. Germain, whose work was published early in the reign of Henry the Eighth.

"Student. A man seised of certain lands in fee hath a daughter, which is heir apparent, the daughter taketh an husband, and they have issue; the father dieth seised, and the husband as soon as he heareth of his death goeth toward the land to take possession, and before he can come there, his wife dieth: whether ought he to have the land in conscience for term of his wife as tenant by the curtesy, because he hath done that in him was, to have had possession in his wife's life, so that he might

to make it at all. And if he did not, then *what* did he intend, by inserting the last sentence of the quotation? This topic may possibly be handled more at large, in the contemplated "further observations" mentioned in the text.

In the meantime I take occasion to mention, that from an extract of an opinion of the late judge Kennedy, delivering the opinion of the supreme court of Pennsylvania, in *Chew v. The Commissioners of Southwark*, 5 Rawle 161, I infer that this lamented judge thought that, in the respect here noted, the law of curtesy was on the same footing in Pennsylvania as in Connecticut. "It is not necessary I apprehend," says he, "to entitle a husband to claim by the curtesy in this state, that there should have been, what is considered in England an actual seisin of the wife or the husband during the coverture. It is sufficient if she were invested with the title to an estate of inheritance, and had seisin of the freehold thereof in law, by having a right to demand and receive the rent accruing from the enjoyment of it, either by a tenant at will, or for a term of years, if out on lease; or otherwise to demand and recover the immediate possession thereof; or as the late Mr. justice Duncan expresses it in *Stoolfoos v. Jenkins*, 8 Serg. & Rawle 175, 'if there was a potential seisin or right of seisin.' This doubtless would be sufficient, according to the rule, which has obtained under our intestate law, regulating the descent of real estate in Pennsylvania, to enable the surviving issue of the wife after the death of the same, to claim and have the estate as her heirs. Seisin in fact on the part of a parent during his life is not requisite, to entitle the issue of such parent after his death to claim the real estate to which the parent had a title in fee, as his heirs. Ownership without seisin, not only regulates the descent of real estate here, but likewise gives the right to dispose of the same, either by deed or will. This also seems to be the law of Connecticut, according to the cases of *Bush v. Bradley*, 4 Day 298, and *Kline v. Beebe*, 6 Conn. Rep. 494, 499."

His honour's remarks appear however, to have been extra-judicial; and as I have reason to hope that the subject in its connexion with Pennsylvania decisions may hereafter be treated by a gentleman of that bar, I forbear observation on a matter necessarily but imperfectly understood by me, as belonging to the profession in another state.

have been tenant by the curtesy according to the law; or that he shall neither have it by the law nor conscience?

Doctor. Is it clearly holden in the law, that he shall not be tenant by the curtesy in this case, because he had not possession in deed?

Student. Yea verily,¹ and yet upon a possession in law a woman shall have her dower; but no man shall be tenant by the curtesy of land, without his wife have possession in deed.

Doctor. A man shall be tenant by the curtesy of a rent, though his wife die before the day of payment, and in likewise of an advowson though she die before the avoidance.

Student. That is truth; for the old custom and maxim of the law is, that he shall be so: but of land there is no maxim that serveth him, but² his wife have possession in deed.

Doctor. And what is the reason that there is such a maxim in the law, of the rent, and of the advowson, rather than of land, when the husband doth as much as in him is, to have possession, and cannot?

Student. Some assign the reason to be, because it is impossible to have possession in deed of the rent, or of the advowson, before the day of payment of the rent, or before the avoidance of the advowson.

Doctor. And so it is impossible that he should have possession in deed of land, if his wife die so soon that he may not by a possibility come to the land after her father's death, in her life, as the case is.

Student. The law is such as I have showed thee before: and I take the very cause to be, for that there is a maxim serveth for the rent and the advowson, and not for the lands, as I have said before: and, as it is said in the eighth chapter of our first dialogue, *it is not alway necessary to assign a reason or consideration why the maxims of the law of England were first ordained and admitted for maxims; but it sufficeth that they have been always taken for law, and that they be neither contrary to the law of reason, nor to the law of God, as this maxim is not; and therefore, if the husband in this case*

¹ Acc. Perk., sect. 470.

² That is, be-out, with-out, unless: see Horne Tooke's *Diversions of Purley*, p. 100-117, Lond. ed. 1840.

be not holpen by conscience, he cannot be holpen by the law.

“*Doctor.* And if the law help him not, conscience cannot help him in this case, for conscience must always be grounded upon some law; and it cannot in this case be grounded upon the law of reason, nor upon the law of God; *for it is not directly by those laws, that a man shall be tenant by curtesy, but by the custom of the realm*; and therefore if the custom help him not, he can nothing have in this case by conscience; for conscience never resisteth the law of man, nor addeth nothing thereto, but where the law of man is in itself directly against the law of reason, or else the law of God, and then properly it cannot be called a law, but a corruption; or where the general grounds of the law of man work in any particular case against the said laws, as it may do, and yet the law [be] good, as it appeareth in divers places in our first dialogue in Latin; or else where there is no law of man provided for him that hath right to a thing by the law of reason, or by the law of God: and then sometime there is remedy given to execute that in conscience, as by a *subpœna*, but not in all cases; for sometime it shall be referred to the conscience of the party, and upon this ground, that is to say, that when there is no title given by the common law, that there is no title by conscience. There be divers other cases, whereof I shall put some for an example: As if a reversion be granted unto one, but there is no attornment, or if a new rent be granted by word without deed; there is no remedy by conscience, unless the said grants were made upon consideration of money, or such other. And in likewise, where he that is seised of lands in fee simple maketh a will thereof,¹ that will is void in conscience, because the ground serveth not for him, whereby the conscience should take effect, that is to say, the law. And if the tenant make a feoffment of the land that he holdeth by priority, and taketh estate again and dieth (his heir within age), the lord of whom the land was first holden by priority, shall have no remedy for the body by conscience; for the law that first was with him, is now against him, and therefore conscience is altered in likewise as the law altereth. [The mo-

¹ The statutes of wills were made subsequently, in the latter part of the reign of Henry the Eighth.

dern phrase is *acquitas sequitur legem.*] And divers and many cases like be in the law, that were too long to rehearse now. *And thus methinketh, that if the law be as thou sayest, the husband in this case hath neither right by the law nor conscience.*"¹

THE DECISION IN CASE v. CUSHMAN.

What is the decision in Case v. Cushman, 1 Barr 241? Is it to be considered as overruling the long and well settled principle of law, that a debtor while the cause of action is complete and in full force, may by his acts or declarations waive the right to use the time that has elapsed, as a bar under the statute of limitations; or is it in accordance with rules settled at least in the forum of that decision? It is submitted, the case is misapprehended, and as is not uncommon the language of the judge, correct enough as to the point before him, is alone relied on, and the facts are forgotten. These are, that in 1830, a cause of action accrued to a party in New York, which was suspended by reason of the debtor's absence from the state at that time. Upon his return, the statute commenced running, and the decision assumes that any future absence had no effect to produce a second suspension. The debtor having again left the state, during the period of six years from the commencement of the cause of action, made an acknowledgment of the debt, and the sole question for the court on the record (and it is needless to say how often we are cautioned to consider that as the decision), was, whether this acknowledgment gave a new cause of action, which was suspended by reason of absence, or was it but a bare continuance of the old one, though the six years of the statute might be calculated from that day? The court decided there was but one cause of action, viz. the original debt. That a new promise added nothing to the obligation, and could not have itself been sued on, hence the period of the statute having commenced though it might be suspended, and a new start taken from the time of the promise, it still continued its course. Ad-

¹ Dr. and Stud., dial. 2, chap. 15.

mitting at the same time, had the debt been barred by the statute, the new promise would have been an independent cause of action, and hence liable to be suspended as the former one was by reason of absence. Thus they have added another to the train of uniform decision in this state, on the subject of the statute of limitations: the ground of which is probably as well expressed in *Earnest v. Parke*, 4 Raw. 452, as elsewhere. It is, that where a promise produces no change in the position of the party as to remedies, the original liability is the only one must be sued on; where such change is produced, the new promise gives a separate and distinct cause of action, and may, and ought to be declared on. There the rule was applied to a promise by a discharged insolvent, which gave such a new cause of action, that the party was liable to arrest under the judgment. The distinction between a promise before and after the bar by lapse of time, is seen in that series of cases which has now settled in Pennsylvania, that a subsequent promise or acknowledgment must be such an one as would be a ground of action, where the original consideration would not be by itself sufficient. It is consistent with the English cases which say it is not a continuation of the old debt, but the formation of a new contract, though the practice of declaring on the old one has become too inveterate to be changed. But which it would perhaps be wise to alter after this decision. If this be the correct view of the case, not only will the decision be in accordance with principle, but the reasoning in support of it will be so also. The inference endeavoured to be made from it, that no promise or acts of the party will suspend the statute or give a new period, alone will fall. That the decision was intended to cover this is too absurd for argument,—it would be that a debtor who for six years has made partial payments on a note, or by regular payments of interest, induced a creditor to delay his suit without an express stipulation, should be permitted to avail himself of such kindness to avoid the debt; which is contrary to common sense and uniform decision. The distinction is simply this,—a new promise adding nothing to an already perfect right, gives no new cause of action; it is but evidence of the old one, or a continuance of it as from that time.

IN THE COMMON PLEAS OF LANCASTER COUNTY.

OLIVER FURNIS, ADMR. OF ALEXANDER EWING, DECEASED, v. SARAH S. EWING.

1. An executor or administrator, plaintiff, who fails without any default on his part in an action founded upon the claims of the decedent, is not liable out of his own estate, to the payment of his adversary's costs and charges.

Opinion of the court, as delivered by LEWIS J.

The declaration has not been laid before us, but it was admitted in the argument and statement of facts made at the time, that the action was founded upon a trover and conversion in the lifetime of the plaintiff's intestate. The verdict was for the defendant, and the present motion is to set aside an execution issued against the plaintiff to be levied *de bonis propriis*. The question raised by the motion, is whether an executor or administrator (plaintiff) who fails, without any default on his part, in an action founded upon the claims of the decedent, is liable, out of his own estate, to the payment of his adversary's costs and charges. This court has heretofore expressed an opinion on this question in the case of *Barton v. Barton*, reported in the 5th vol. Pennsylvania Law Journal, No. 3, p. 142. We are called upon to reconsider the question, in consequence of some observations made by Mr. justice Sergeant, in the recent case of *Penrose v. Pawling*, 8 W. & S. 379.

In England, until the statute of 3d and 4th W. 4th gave the court a discretion in the subject, it was the undoubted law that an executor or administrator was not liable for the costs in such cases; Toller 439; 2 Bac. Abr. 46; Cro. Jac. 228; Tidd's Prac. 894; Sayer on Costs 97-100. At common law, no costs were recoverable in any case. The statute of 23 Hen. 8, c. 15, under which costs are given to defendants, does not extend to suits brought by administrators or executors, *on causes of action which accrued to their decedents*. The words of the statute are limited to actions brought upon "any especialty *made to the plaintiff*," or on "any contract supposed to be *made between the plaintiff* and the defendant," or "for goods whereof the

plaintiff shall suppose the property *belongeth to him*," or for "any wrong personal, *immediately* supposed to be done to the *plaintiff*." This statute undoubtedly extends to suits brought by executors or administrators, *on causes of action which accrued to themselves, after the death of their decedents*, although the actions may have relation to the affairs of their decedent, and although they unnecessarily describe themselves in their writs as representatives. But the construction has been long settled in England that it does not extend to suits founded purely upon the claims of the *decedent*. In that case, it cannot be said that the cause of action is either a "specialty made to the *plaintiff*," or a "contract with the plaintiff," or a wrong done "*immediately* to him." The action being founded entirely upon the contracts with or wrongs done to the decedent, it cannot be supposed that the representative is cognizant of the merits of the claim. His case would be one of peculiar hardship, if compelled to pay costs, out of his own estate, for the faithful discharge of his duty. It cannot be presumed for a moment, that he would so far disregard his oath of office and the duties of his trust, as to bring vexatious suits without any reasonable grounds whatever. And in the absence of evidence of misbehaviour, we must take it that the executor or administrator brought the suit in good faith, in the execution of his duty. If he neglect to bring suit, in a proper case, he may be made liable for the claim thus lost to the estate. And, on the other hand, it is proposed to punish him, not only to the amount of his own expenses, and the fees of the officers, but to the extent of his adversary's costs, if he prosecute with vigilance and fail, or if he discontinue the action upon discovering that it cannot be sustained. This may discourage him from the performance of his duty, and work great injury to the creditors and others interested in the decedent's estate. If the decedent had brought the action in his lifetime, the defendant had no other security for the costs, than the *estate* of the plaintiff. He has the same security when the action is brought by the representative. It is not pretended that the estate of the decedent should be exempt from the costs of an action brought in good faith for its benefit. And whatever difficulties may stand between the defendant and the fund justly liable for the expenses, there is an obvious injustice in

punishing an innocent officer for the performance of his duty—by making him personally liable, without assets to meet the charge. It has been said that there is “an obvious justice that a man against whom a vexatious suit has been brought, should recover his costs, and that it is *nothing to him on whom the costs fall*, whether on the estate or on the executor personally.” Now, it cannot be said with propriety, that a suit is in any proper sense “vexatious,” when brought upon reasonable grounds, by a representative wholly ignorant of the merits of the case, in the disinterested and honest performance of his duty. If “vexatious,” it should only be deemed so as against the estate which was to have received the advantage, and not as against the representative, who, as he was to derive no benefit from it, ought to receive no injury. The argument which justifies taking the costs out of the pocket of the latter, seems to rest upon insubstantial foundations. It assumes the suit to have been “vexatious” because unsuccessful, which is contrary to the rule of the common law, for if attempt be made by a defendant in a criminal prosecution to recover the costs and charges from the prosecutor, it can only succeed where there was a want of *probable cause* for the prosecution. It is also contrary to the rule in chancery, which relieves the unsuccessful party from costs if he had *probabilem causam litigandi*; Lord Bacon’s Abr. 54. It is against the principles of justice, which never inflict punishment without fault—which never shift the misfortunes of one man to the door of another, and which sternly discountenance the principles under which the bandit justifies the plunder of one man to obtain indemnity for wrongs inflicted by others. It has already been said, that an executor or administrator is not personally liable in England; 2 B. & P. 255; 2 Bac. Abr. 517. The same rule prevails in *South Carolina*, 2 Bay. 166; 1 Bailey 79; 2 Bailey 6, 53; in *Kentucky*, 2 Litt. 387; 2 J. J. Marsh. 479; 3 Dana 157; in *Virginia*, 1 Wash. 138; in *Ohio*, 5 Hammond 45, 270; in *Indiana*, 1 Blac. 385; in *New York*, 3 John. 249; 4 Cowen 550; 6 Cowen 612; 4 Cowen 87; and, if we may confide in the highest authority in the state, the rule prevails in Pennsylvania; 11 S. & R. 247. In the latter case, the present chief justice, in delivering the opinion of the court stated in the presence of chief justice Tilghman, and with the concurrence of Mr. justice Duncan, that there was no

"usage" in Pennsylvania in opposition to the rule which prevailed in England; but on the contrary, that "it was a wise regulation, and one that is absolutely necessary for the protection of creditors and all others interested in the decedent's estate." This decision was directly on the question. The execution was set aside because it issued against the plaintiff *de bonis propriis*, and included the fee of the *defendant's attorney*. It was conceded that there was a distinction between the *fees* of the officers (for which the plaintiff was liable as their employer), and the *costs* of the adverse party (for which he was not liable). The practice was in conformity with this decision. The same principle had been previously sanctioned by the supreme court, in the case of *The Insurance Co. of Pennsylvania v. Hewes, executor of Anthony*, 5 Bin. 508. The arbitration law of 1810 was so liberally construed in favour of executors and administrators, that they were allowed to appeal without payment of costs, as required of other parties. This decision was pronounced by chief justice Tilghman, with the express concurrence of justices Yeates and Brackenridge. The venerable chief justice remarked, at the time of delivering the opinion, that "it would be very hard indeed to make executors pay costs to obtain an appeal which, in the event of the suit, they might never recover again. The consequence of such hardships would be that executors or administrators might rather acquiesce in an unjust award, than enter an appeal. And in such case the loss would fall not on themselves, but on those entitled to the estate of the deceased, very often widows and infant children." Mr. justice Yeates declared that "it would require strong and clear words to show an intention in the legislature to subject executors to the payment of costs out of their own pockets, when, perhaps there may be no assets in their hands;" 5 Bin. 511. Every principle of policy which justifies an appeal by an executor without payment of costs, sanctions the prosecution of the suit to judgment, without incurring personal liability to his adversary. The appeal is given for the purpose of prosecuting the suit to a final determination. Of what avail is the appeal, if the suit may not with safety be prosecuted to final decision? Such enlightened jurists as Tilghman, Yeates, Duncan, and Brackenridge, cannot be supposed capable of sustaining a policy so senseless, imperfect, and disjointed.

But this policy was not confined to the judicial tribunals. The legislature gave it their sanction. The act of 1810, commonly called the hundred dollar law, expressly excepted executors and administrators from the requisition to give security for costs on appeal; 4th sec. act 20th March, 1810. The same law positively prohibited the justices from issuing executions *de bonis propriis*, against executors or administrators, *in any case* (11th section); and it provided that if the representative "after judgment" (whether for debt or costs), "declared that he had not sufficient assets to satisfy such judgment," the justice should certify the judgment to the prothonotary, and the court of common pleas should appoint auditors to apportion the assets "*as in other cases.*" The words "*as in other cases,*" may be understood as a legislative recognition of the practice in Pennsylvania, under which executors and administrators were not held liable, out of their own estate, but only held accountable for the assets which came to their hands; and that in case of deficiency, these were apportioned among the creditors. The practice thus referred to in 1810, received the form of legislative enactment on the 24th February, 1834. In sections 35, 36 and 37, it is provided, that in "*every case* of an execution against executors or administrators," where "the personal assets of the decedent are insufficient," the court "*shall stay all proceedings*" until the executors or administrators make application to sell the real estate; or for the apportionment of the assets, or both." And in no case shall any "omission to plead or reply," or any "mispleading or lack of pleading," "make them liable, beyond the amount of assets which in fact have come or may come to their hands."

As a still further expression of the legislative will in regard to executors and administrators, the act of 16th June, 1836, sec. 31, expressly allows them to appeal from an award, *without payment of costs*, except in cases where they themselves have entered the rule to arbitrate; and a similar exemption is contained in the act of 13th April, 1846.

We have also authority for saying, that the rule in equity in general, exempts parties suing in *autre droit* from personal liability for costs, unless in cases where they have greatly misbehaved. 1 Eq. Cas. Abr. 125; Beames on Costs 89; 3 John. Ch. R. 520; 1 Paige 472.

Against all these authorities from the common law, from the legislature, and from the chancery; from England, from our sister states, and from the decisions and practices of our own state, several cases have been cited in the argument. These we now proceed to consider. The case of *Hardy v. Call*, 16 Mass. 530, may be disposed of with the remark, that it is founded upon a statute of Massachusetts, which expressly directs that the judgment against an executor or administrator, plaintiff, shall be *de bonis propriis*. Vide Mass. Revised Statutes 437. It is unnecessary to say, that a decision, upon such a statute, can have no application to proceedings in this state, where we have no such statute, and where on the contrary, the whole course of our legislation has proceeded upon views of policy totally different. The case of *Sterrett's Appeal*, 2 Penn. R. 419, was where the executor was making a claim of his own, for services rendered since the death of the testator, and which was defeated, upon an examination of his accounts before auditors. It was clearly just that he should pay the costs in such a case; and it is manifest that the decision can furnish no rule for cases, where the action is brought purely on the claims of the decedent. The case of *Muntorf v. Muntorf*, 2 Rawle 180, raised no question of the kind now under consideration, and the remarks of the judge cannot be regarded as binding upon any court. Still less can they be considered as overturning a solemn decision of the supreme court previously made, directly on the question. One of the sons of John Muntorf, the elder, took the estate of the decedent at the appraisement in the orphans' court, on the 17th January, 1823, and on the same day, sold it to two of his sisters who took possession. Ten months afterwards, a verdict was rendered against the administrators of the decedent, in an action which they had brought on a claim of the deceased. On this judgment, an execution issued for the costs, and on the 3d August, 1826, a deed was made by the sheriff in pursuance of a sale to the same John Muntorf, who had previously taken the land and sold it to those in possession. The question was, whether costs which accrued not only after the intestate's death, but after the land had been taken at the appraisement and sold, could be a lien on the real estate as against the purchasers. Although the debts of a decedent are liens upon his real estate, it is manifest that costs which had no existence at

the time of his death, cannot be a lien against such a purchaser as appears in this case. The case of *Muntorf v. Muntorf* does not overrule the previous decision. Indeed it is stated expressly, that there is no intention to interfere with the decision in *Musser v. Good*, 11 S. & R. 250. The remaining decision to be considered is, that of *Pawling v. Penrose*, 8 W. & S. 379. In that case, the plaintiff was nonsuited after an appeal by the defendant; and the question was not whether the administrator, plaintiff, should pay costs to his adversary (for *no such claim was made or pretended by any one*), but whether he should *refund* the *fees of the officers*, for which he was undoubtedly liable as their employer, but which the defendant, either by mistake or by illegal exaction, was induced to pay upon entering an appeal. The defendant was an executor, and defending the suit in that character, had clearly a right to appeal without payment of costs. The rule to arbitrate had not been entered by him, but by his opponent. His right to appeal without payment of costs, was clear, and his right to recover them back was equally clear. The whole ground of his claim to have the costs refunded, arose *since the death of the decedent*. The plaintiff had become liable to the officers employed by him, as a debt of his own, personally contracted, since the death. And the defendant by his payment since the death, had acquired a right to recover them back, against the person who in effect had received them. The question of an executor's liability for the costs of an action brought on the claims of the testator, could not possibly arise in the case. The defendant in the case had not made any such claim upon the plaintiff. On the contrary, the question expressly submitted by the parties in the case stated, was "whether the defendant was entitled to have the costs which he had paid to the benefit of the other party, or any portion of them, *refunded*; and "whether he was not entitled to recover them" *in an action* (not by execution) against the former plaintiff personally. It was held, that he was entitled to recover, and judgment was rendered accordingly. The decision was indubitably correct, 9 John. 376, 377. But the observations of Mr. justice Sergeant, based upon those made by Mr. justice Rogers in *Muntorf v. Muntorf*, on the question not raised by the record, nor submitted for decision by the parties, cannot be regarded as overruling decisions previously made, in accord-

ance with our own usages, with the whole course of our legislative policy, with the principles adopted in chancery, with the decisions of the common law courts in England, and with the adjudications in almost every state in the union.

It is therefore ordered, that the execution be set aside.

IN THE COURT OF COMMON PLEAS FOR THE CITY
AND COUNTY OF PHILADELPHIA.

[Sept. 5, 1846.]

MINTZER *v.* BLIGHT.

1. Upon an appeal from the judgment of an alderman before whom the action was commenced by *scire facias*, it is unnecessary to file a declaration in order to take judgment for want of an affidavit of defence, under the rule of court.

This was an appeal from the judgment of alderman Bryant upon a *scire facias*, to revive a judgment on his docket. At the second term, the plaintiff's attorney directed judgment to be entered for want of an affidavit of defence, under the rule of court, without having filed a declaration.

Brightly for defendant, obtained a rule to show cause why the judgment should not be opened, and for cause, alleged the want of a narr. as is required by the rule of court, which provides "that no judgment shall be entered by virtue of the rule unless the plaintiff shall have filed a declaration during the term to which the appeal is entered." Rules of court of C. P. p. 1. The *scire facias* is not returned to the court with the appeal; there is nothing therefore on record to show the plaintiff's cause of action.

Abrams, contra.

Per curiam. It has been the constant practice of this court for many years, to proceed without a declaration, where the action is commenced by *scire facias*, which cannot now be disturbed; the rule must therefore be discharged.

IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF LANCASTER.

JAMES MILES *v.* THADDEUS STEVENS, ESQUIRE, WHO SURVIVED
CHARLES OGLE, ESQUIRE, DECEASED.

1. A contract made in contemplation of the passage of legislative acts, which were essential to the object of the contract, and the passage of which was confidently expected by both parties, ought not to be enforced, when the legislature refused to pass those acts, and adopted other measures entirely defeating the object of the parties in making the contract.
2. The equity of such a case, is essentially the same as if the contract had been made under a mutual mistake of a material fact, "the efficient cause of its concoction."

Amicable action to September term, 1844, No. 1, of debt founded upon an agreement under seal, dated March 3, 1837. The defendant pleaded payment with leave to give the special matters in evidence. Trial, 1st September, 1845. The leading facts are set forth in the following charge to the jury by

HAYES, president: On the 2d day of March, 1837, an agreement under seal was made between James Miles, the plaintiff in this suit, and Thaddeus Stevens and Charles Ogle, now deceased, by the terms of which, in consideration that he, James Miles, agreed to sell to the said Stevens and Ogle, their heirs and assigns, one undivided half part of two hundred acres of land situate on Elk creek, in the county of Erie, including the mouth of said creek, and to embrace the lands at the harbour of the said Elk creek, best suited for the site of a city, intended to be located on the same, by the said Miles, Stevens and Ogle—the said Stevens and Ogle agreed to pay to the said Miles, on the first day of August then next, the sum of five thousand dollars. It was further agreed, that James Miles should be allowed to retain out of the purchase, arising from the sale of lots in the said city, the sum of ninety-five thousand dollars: and it was further agreed, that after he should have received the said \$ 5000 of the said Stevens and Ogle, and also have retained out of the moneys that might come into his hands, arising from the sale of the lots in said city, the sum of ninety-five thousand dollars, as before mentioned, he should execute a deed, assigning and conveying, clear of all incumbrances, unto the said Stevens and Ogle, their heirs and assigns, the one undivided half part of

all lands and lots then remaining unsold, part and parcel of the said two hundred acres before described, and also one half of all the purchase money due and to grow due, for sales of lots over and above the said ninety-five thousand dollars. And it was also further agreed between the said parties, that if the said \$95,000 should not be received by the said Miles, within ten years from the date of the agreement, in that event the said Stevens and Ogle, their heirs and assigns, should relinquish all claim to any interest in the said two hundred acres of land, and the same should remain to the said Miles, his heirs and assigns, as fully as if this agreement had not been made; unless the said Ogle and Stevens should, at any time before the expiration of the said ten years, prefer to pay, and do pay, unto the said Miles, his heirs and assigns, the balance that may be due to the said Miles, his heirs and assigns, of the fifty thousand dollars, the estimated valuation of the one half of the said two hundred acres of land. And it was further agreed, that the said Miles should not sell or dispose of his interest in the said two hundred acres of land, until the said first day of August next. There were some other stipulations, not material, which the jury will see, when they read over the agreement. This action is brought against Thaddeus Stevens, the surviving joint contractor (Charles Ogle esq., being dead as before stated), to recover the sum of five thousand dollars mentioned in the agreement as payable on the 1st of August, 1837, with the interest accruing thereon from that day. The defendant contends, that this money ought not to be paid nor demanded: 1st, Because there were fraud and misrepresentation on the part of the plaintiff, by which the defendant was misled to enter into this contract; the imputed fraud consisting, in the plaintiff's pretending that there was a harbour at the mouth of Elk creek, whereas no such harbour existed, and that he was the true owner of the lands lying at the mouth and on both sides of the said creek, near the mouth thereof, when he had, in fact, no good title to the land. 2dly, Because the whole contract was founded on the supposition and belief of the parties, that the Erie extension of the Pennsylvania Canal, would terminate at the mouth of Elk creek, and the government of the United States would make a large appropriation for the opening and establishing of a harbour at the mouth of the said creek; in consequence of which, a city would

be built up at that place, and the land there become of immense value as a city plot; and because, these events not having occurred, neither the canal having terminated at the mouth of Elk creek, nor any appropriation having been made to open and establish a harbour there, the basis of the contract has been wholly removed and destroyed. Wherefore, it would be against equity and good conscience, to enforce the same by requiring the payment of the said five thousand dollars.

As to the first point of this defence, it is undeniable that if fraud were practised upon the defendant by the plaintiff, inducing the former to enter into this agreement, such fraud would entirely vitiate the contract, and the plaintiff for that reason could not recover. It is for the jury to say, whether there was or was not such a misrepresentation in regard to the facts of an existing harbour, or the plaintiff's title, as the defendant contends there was; and it must be decided by you, according to the evidence, for fraud must be proved, either directly or by such circumstances in the conduct of the party charged with it, as are inconsistent with honesty and the principles of morality. Fraud has been defined to be any cunning deception or artifice used to circumvent, deceive, or cheat another. This definition, though sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury, does not include the large class of implied or constructive frauds, which are within the remedial jurisdiction of a court of equity. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another. And courts of equity will not only interfere in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done; 1 Story's Equity, ch. 6.

With respect to the 2d point of the defence, if there were any natural and insuperable obstacle to the laying out of a city, at the mouth of Elk creek, equally unknown to all the parties to this contract, and which would have utterly defeated their object, in making it; as, for instance, had Elk creek emptied into Lake Erie through a deep ravine with high bluffs on each side,

extending to and facing the lake, or had this creek turned and emptied into some small interior lake, and not fallen into Lake Erie at all, here would have been a mutual mistake, in regard to a fact material to the contract, which would have unquestionably constituted a valid defence, to such a suit as the present. For the general rule is, that an act done, or contract made under a mistake, or ignorance of a material fact, is voidable and relievable in equity; and the rule applies not only to cases, where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance and mistake on both sides. The fact must be essential to the character of the contract, and an efficient cause of its concoction. D. buys an estate of P. to which the latter is supposed to have an unquestionable title. It turns out upon due investigation of the facts, unknown at the time to both parties, that P. has no title, (as if there be a nearer heir than P. who was supposed to be dead, but is in fact living), in such a case, equity would relieve the purchaser and rescind the contract. So if one person should sell a messuage to another, which was at the time, swept away by a flood or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser upon this ground, that both parties intended the purchase and sale of a subsisting thing, and implied its existence, as the basis of their contract. It constituted therefore the very essence and condition of the obligation of their contract. And the same principle, it is said, will apply to all other cases, where the parties mutually bargained for, and upon the supposition of an existing right. Thus if a purchaser should buy the interest of the vendor, in a remainder in fee expectant upon an estate tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and barred the estate in remainder, a court of equity would relieve the purchaser in regard to the contract, purely upon the ground of mistake. So if a horse should be purchased, which is by both parties believed to be alive, but is at the time of the purchase, in fact, dead, the purchaser would upon the same ground, be relieved by rescinding the contract, if the money was not paid; and if paid, by decreeing the money to be paid back. The same principle has been applied to the case of a contract between two persons, whereby

one contracted for a large sum, as a contingent compensation for his services, in prosecuting a claim of the other, against a foreign government, for an illegal capture, if it should be successful; and at the time of the contract, the claim had, unknown to both parties, been allowed by the foreign government with a stipulation for the due payment thereof; for the very basis of the contract, was future services, to be rendered in prosecuting the claim, and unless such services were rendered, there was no consideration to support it. The same principle will apply to cases of purchases, where the parties have been innocently misled, under a mutual mistake, as to the extent of the thing sold. Thus, if one party thought that he had *bona fide* purchased a piece of land as parcel of an estate, and the other thought he had not sold it—under a mutual mistake of the bargain; that would furnish a ground to set aside the contract, because, as has been observed, it is impossible to say that one shall be forced to give that price, for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only; 1 Story's Equity, ch. 5, vid. ss. 140-1-2-3-4.

Now, if the parties had made the agreement in question, on the mistaken idea that the legislatures of Pennsylvania and the United States had passed laws, the one for authorizing the canal to be extended to the mouth of Elk creek, the other making appropriations for the harbour there; there is no doubt but that the contract would be set aside, and the defendant be relieved in consequence of this mistake. The difficulty is to determine, whether the same principle applies to a mistake, as to the future passage of these laws, with reference to which the agreement was made, and made in the confident assurance of all parties, that they would pass; so much so, that it is admitted, that without such expectation and assurance, it would not have been made at all. I believe the case, in this aspect, is a novel one, though that of Quick and Stuyvesant in 2 Paige 84, resembles it essentially. The acts to which the parties to this agreement all looked forward, were public acts of independent governments. That they did not pass, as was expected and desired by the parties, is not imputed or imputable, from any thing we have heard, to the negligence of the defendant. The contract was made in contemplation of the passage of such acts; and the

advantages which they all hoped to enjoy, were entirely dependent upon the establishment and growth of a city at the mouth of Elk creek, which, without those acts passed, is as much an impossibility, as if that creek ran down into Lake Erie, through a narrow and lengthened ravine, three hundred feet deep, and were bounded at the mouth on either side, by a precipitous bluff, facing the lake, three hundred feet high. As to the equity, the real justice of this matter, if by the failure of these acts of government, the entire basis of the contract in question, "the efficient cause of its concoction" is now as completely non-existent and impossible, and the purpose and object of the parties rendered as impracticable, as if they had contracted under a mutual and innocent mistake, believing that the acts had already been passed. I cannot see any essential difference in the justice of demanding the money sued for, in the one case, and in the other.

The instruction of the court upon this head therefore, is, that if the jury believe that, the only or main reason of this contract, was the mutual expectation of the parties, that the land immediately adjacent to the mouth of Elk creek, was about to become the site of a great city, as the direct consequence of the Erie canal being taken by the authority of the government of Pennsylvania to that point, and terminating there, and of an appropriation of the general government for opening and establishing a harbour, and that this event is no longer morally possible, the canal having been extended to the borough of Erie, seventeen miles distant from the mouth of Elk creek, then as, the basis of the contract has utterly failed, for that reason—if the jury so believe—I am of opinion, that it would be inequitable to enforce the payment of the five thousand dollars, and that the plaintiff ought not to recover.

The jury found a verdict for the defendant; on which, the court rendered judgment.

Affirmed, on error, by the supreme court.

Mr. Ford & Mr. Penrose, for the plaintiff.

Mr. Frazer, Mr. Stevens, & Mr. Jenkins, for the defendant.

IN THE DISTRICT COURT FOR THE CITY AND
COUNTY OF PHILADELPHIA.

[The following dissenting opinion was delivered recently by his
honour judge SHARSWOOD.]

COOKE v. NEILSON.

The question presented upon this case stated is, whether a tenant from year to year in the absence of a special agreement, can remove at the expiration of any of the current years of his tenancy, without previous notice of his intention to his landlord; and whether by his failure to give such notice, he does not become responsible for the rent of the succeeding year; in other words does not continue in the eye of the law to be the tenant?

The case before us is of a tenancy from quarter to quarter. "I have rented of David Cooke the house I now occupy by the quarter." These are the words of the contract. This phrase, *by the quarter*, expresses, not a term certain, as one-quarter, but the measure of the tenancy: and the tenant is a tenant for so many quarters as he continues to occupy, including the current quarter.

It is clearly established that in a tenancy from year to year, and the same rule is of course applicable to the tenancy in this case—*mutatis mutandis*—the landlord in order to determine the tenancy, must give notice of his intention ending with the current year, or otherwise the tenant cannot be ejected, but becomes entitled to hold for another year.

The general custom of the tenants of farms in the country, to quit at a particular season of the year, has laid a strong foundation in convenience for this rule: and no difference between urban and rural property in this respect, has ever been recognised.

Upon any other principle, the tenant of a farm ejected by the landlord without notice on or after the 1st of April, by an ejectment or the summary process provided by our act of assembly, would be destitute of a home and the means of livelihood, until the ensuing 1st of April.

On the other hand the landlord, whose farm is deserted by the tenant on the 1st of April without notice, is left without a

tenant, and his property is unoccupied and unproductive until the regular time of letting again comes round.

There is in either case a public as well as a private loss, against which it is the policy of the law to provide.

There is not perhaps to be found in the books, any case in which this precise point has been raised and determined *against the tenant*, even in England. Yet there the law appears to be considered as perfectly well settled. It is asserted in the English elementary treatises of the best authority as unquestionable; 2 Bl. Com. 145; Comyn on Landl. 265, 474; Woodfall 145. It is assumed and taken for granted in most of the cases in which the question arose and was decided, as against the landlord; Doe dem. Digget v. Snowden, 2 W. Bl. 1224; Gulliver dem. Tasker v. Burr, 1 W. Bl. 526; Right v. Darby, 1 T. R. 162; Sparrow v. Hawkes, 2 Esp. 504; Kingsbury v. Collins, 4 Bingh. 202; Izon v. Gorten, 5 Bingh. N. C. 501. In Savage v. Dupuis, 3 Taunt. 410, the defendant agreed by parol to rent a house as tenant from year to year for the residue of a term, which was three years and three quarters. He held for three years and one quarter, and then removed. It was ruled, that though perhaps he might have quitted without notice at the end of three years, yet remaining longer, implied a contract to pay rent for the residue of the term. The reason, as sufficiently appears in the report of the case, why he might have left at the end of three years without notice, was that the original lease, out of which the tenancy from year to year was derived, not having another integral year to run, ceased to furnish materials for the longer duration of the tenancy from year to year. We may well therefore apply to this case the maxim, *exceptio probat regulam*. In Wilson v. Abbott, 3 B. & C. 88, the question which arose, was whether the taking was for one year certain or from year to year, and the only reason why that point was at all material in the case, was that the tenant had failed to give notice. A. let apartments in his dwelling house to B. at a rent payable half yearly. B. took possession at Michaelmas, 1822, and at Lady-day, 1823, paid half a year's rent. In June of that year, B. left the apartments without giving any notice to quit, but at Michaelmas, 1823, which was the expiration of the first year of his tenancy, he paid half a year's rent. At Lady-day, 1824, the landlord demanded

another half year's rent, which the tenant refused to pay, and the court of king's bench held that the tenant was not liable, distinctly upon the ground that in the case of lodgings, which are not usually let for so long a period even as a year, they could not infer from the facts a contract from year to year. It is plain therefore, that unless it had been considered a conceded point, that if B. was a tenant from year to year, he was bound to give notice, no question at all would have arisen in the case.

This doctrine is most consonant with the other incidents which have been attributed to tenancies from year, and with the history and character of this kind of interest. It arose from the old tenancy at will. The inconveniences resulting from a sudden determination of the will by either lessor or lessee, induced the courts to convert all lettings for an indefinite duration, when an annual rent or other return at a certain period was agreed on, as tenancies from year to year, and to require a reasonable notice by either party to the other before the estate could be determined. It was perhaps judicial legislation; and though its date be, as is supposed, 13 Hen. 8, it is now as much and as inseparably a part of the common law as any doctrine, let it have sprung ever so near its yet undiscovered fountain head. Thus, some degree of certainty in the possession—not only the matter of repose, but the sure incentive to the industry and enterprise of the possessor, and the consequent increase of the public wealth and strength—was imparted to an interest which was before vague and uncertain. Accordingly it has always been held that in pleading this estate, it may be averred to be a term for so many years as the lessee has occupied, including the current year, and it was assured to continue to the end of that year, and still longer unless either party before the expiration of the current year, gave notice of his intention to determine the estate; 4 Bacon's Abr. 180 n.; Legg v. Stredwick, 2 Salk. 414; Birch v. Wright, 1 T. R. 380; Webber v. Shearman, 6 Hill 20; 8 S. & R. 468. Still however it is in legal phrase a tenancy from year to year, *quamdiu ambabus partibus placuerit*; and as it was held at a very early period, it partakes of the nature of the old tenancy at will in this very important particular, that it is of the essence of the estate that it shall be at the will of both the lessor and the lessee: so that if parties should ex-

pressly contract for an estate to be held at the will of one of them only, the law will not recognise such an interest, but at once annexes to the estate created by the contract, that *mutuality*, which, like the power of alienation in an estate in fee, is its inseparable incident; Keilw. 65, pl. 6; ib. 162, pl. 4; 13 Hen. 8, 16, pl. 1. This principle of mutuality ran through the whole law of tenancies at will in a very remarkable manner. Thus, if the lessor determined his will in the middle of a quarter, he lost the whole rent of that quarter. If the lessee in like manner determined the estate in the middle of the quarter, he was liable for the rent of the whole quarter; Layton v. Field, 3 Salk. 222, pl. 1, S. C.; 1 ld. Raym. 707. If the lessor determined the will, the lessee was entitled to the emblements, with free entry, egress and regress, to cut and carry them away: aliter, if it was determined by the act of the lessee; Littl. s. 68; Co. Litt. 55, b; Stomfil v. Hicks, Holt 414. The landlord could only determine the estate by some notorious act, upon the ground or by notice to the tenant. In like manner it was expressly held, that the tenant could not determine his will secretly without notice given to the lessor; 2 Bl. Comm. 145; Co. Litt. 55, b; 1 Roll. Abr. 861; Highly v. Bulkly, 1 Sid. 339; T. Jones 5. It is unnecessary to pursue these analogies further.

The case of Hemphill v. Flynn, 2 Barr 144, does not in the least touch this principle of mutuality. That was not a case of tenancy from year to year, but for a year certain. The tenant held over, and claimed upon payment of the rent of the first quarter of the second year, that he had a right to give up the possession, and be released. It was decided that the landlord might either elect to trust him as a wrong-doer or as a tenant for another year, upon the terms of the original letting, while the tenant had not the same right of election: in other words, could not elect to consider himself as a trespasser—could not take advantage of his own wrong.

It is supposed however that there is a custom contrary to this in Pennsylvania, of which the court can and is bound to take notice as part of the common law of the state. The impression of the bar, when it has become the ground of a well settled course of counsel and practice, is no doubt entitled to the most profound respect. It is rarely, if ever wrong. But it should be of the most clear and unequivocal character, to establish a

general custom, differing from the common law. Can the impression referred to be considered of this character, when we find judge Duncan, than whom no man had a larger practice at the bar nor longer experience in the interior counties, saying, of the provision in regard to notice: "It prevents a surly landlord from dispossessing his tenant at an unreasonable time of the year, and a perverse and crooked tenant from quitting when the landlord cannot procure another tenant?" *Logan v. Herron*, 8 S. & R. 472; and judge Kennedy, who was as distinguished for his accuracy as for his extensive learning, and who would not have failed to qualify his language if he had entertained a doubt, expressing himself as follows: "My idea of a lease from year to year is this, that it is binding prospectively on the parties for one year only, capable however of being extended to a second, third, fourth or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months' previous notice to that effect?" *Lesley v. Randolph*, 4 Rawle 127.

On the whole, I am of opinion that judgment on this case stated, should be entered for the plaintiff, but as the majority of the court entertain a different opinion, judgment must be entered for the defendant.

[February 15, 1828.]

SYLVESTER V. GIRARD.

This was a highly interesting action, brought by the plaintiff, a lottery broker, to recover of the defendant, a celebrated banker, one thousand dollars, the value of a bank note issued by defendant out of his bank, payable in the usual way, to bearer. The circumstances as detailed in evidence, were substantially as follows: On the close of the 10th day of May, 1827, the exchanges at the Bank of the United States, were made ready for settlement; the notes, as they were to go to each bank in the morning, were placed in the respective books, and the amounts labelled; and the accounts were added up, and found to correspond, as usual, within a few cents to the money on hand. Among the books, was that belonging to Stephen Girard. It

appeared, in evidence, that every bank in the city was in the habit of sending around, every morning, to each other, all the notes received of their's the day before, and that these formed an account between each. Stephen Girard's book was settled that day, as usual, and the amount of notes inside stated at 29,000 dollars. The next morning, the 11th May, early, Mr. Clew, a porter in the Bank of the United States, had possession of the book, as usual, and laid it on the desk of the first teller. Mr. Girard's teller came to settle the book, and took it up from the teller's desk, according to custom. On counting the notes, they were found to be two thousand dollars short. The label was altered to 27,000 dollars; the alarm was then given, and measures were taken to detect the theft. Notices not to pay the notes, were given to the Mechanics', Schuylkill and Commercial, as well as other banks. At the Mechanics' Bank, one of the 1000 dollar notes had been deposited by Mr. Ashhurst. While these transactions were going on, the circumstance upon which the present action was brought, took place. It seemed that the runner, Clew, had speculated largely in lottery tickets, and had drawn some few capital prizes, but not enough to remunerate him for the multitude of blanks with which his ill fortune had cursed him. Amidst these lottery dealings, he had become indebted to the plaintiff, N. Sylvester, and had given his note for \$ 924, payable on demand.—Shortly after the theft of the notes, on the same morning, Clew went to Sylvester, and tendered him one of the notes, to take five hundred dollars out of, on account of the debt. Sylvester took the note over to the Mechanics' Bank, and asked the teller to change it. The teller asked how it had come into Mr. Sylvester's possession, and informed Mr. S. of the circumstance that had taken place at the United States' Bank. Sylvester answered, that he had received it from a person who had come to pay him some money. The teller requested Mr. S. to leave the note, in order to send it to the United States' Bank for information; this was declined by Mr. Sylvester, on the plea that the individual who had given it to him, was a responsible man. Mr. S. then went over to his office opposite the bank, where the man was, and returned shortly, saying that the man had said he found it in the street. The teller asked who the man was, "as a matter of curiosity." Mr. S. replied, "if it were requested he would give the name;

the man was a responsible man, and could be found." Mr. Sylvester did not give the name. The teller told him, when he came back the second time, that "there was no doubt the note was stolen." A few minutes after this transaction took place, one of the United States' Bank tellers, went into the Commercial Bank, and found Clew in custody; he had been detected in the very act of passing one of the purloined notes. Mr. Sylvester presented his note at Mr. Girard's Bank; it was refused payment; he then procured a notary public to demand payment. After much conversation, the answer was, that "he (Girard) refused to pay, and detained the note, at the request of the Bank of the United States." Mr. Girard kept possession of the note when handed to him by the notary, and peremptorily refused to re-deliver it.

Many minor facts were adduced in evidence. It was proved that Clew had real estate and bank stock; that he was a man of unquestioned respectability, and had the full confidence of the bank.

A very interesting point of evidence, whether testimony going to show the larceny of the notes, could be gone into, to the prejudice of an innocent, bona fide third person, was elaborately argued, and decided in the affirmative.

The arguments of counsel were deeply interesting and instructive. The main ground taken by the highly respectable counsel for the plaintiff, were, that an absolute interest in the bank note was passed and transferred to the plaintiff; that being in possession, he was entitled to reap the fruits; that to deprive him of possession, the *onus* laid upon the defendant: that no participation in Clew's guilt, was charged on the plaintiff; that the note was issued by S. Girard, contrary to the act of assembly; that a bank note passes by mere delivery, and it must be shown that Sylvester was a *particeps criminis*; that Clew could not have stolen the note, but may have found it, as he said, &c. Upon the part of the defendant, it was replied, that possession is nothing without title; that a receiver from a thief, cannot keep a bank note without good consideration; that Clew never *passed* the note, and if he did, no title passed with it; that he did steal it, and attempted to pass it with condition and limitation; that Sylvester, being told the note was lost, he could derive no title; that he was told there was no doubt the note

was stolen—that was notice; that the general rule is, that the holder can pass no better title than he has, that the note was taken to assist gambling; that Clew parted with no right, if he only took the note to change, &c.

Counsel in the case, *Messrs. Binney & Randall*, and *Messrs. Chauncey & Scott*.

JUDGE COX entered into a full examination of all the questions raised in the cause. *Verdict for the defendant.*

IN THE COMMON PLEAS OF PHILADELPHIA.

[March, 1828.]

CONYERS, TO THE USE OF BERRY, v. RUFF.

This was an interesting question, founded on circumstances, alleged to be proof of payment of a judgment. It appeared, that in December, 1819, a judgment was obtained by Walter Conyers against the defendant, for 85 dollars 92 cents, the amount of a certain promissory note indorsed by him. In January, 1820, a certiorari was issued, at the instance of the defendant. Sometime about September in the same year, Berry paid to Conyers the whole amount of debt, interest and costs, and took an assignment of the judgment. In June, 1824, the judgment of the magistrate was confirmed; and in September, 1826, a writ of scire facias was issued to revive the judgment. Under this scire facias, an issue was ordered by the court, to try what amount was owing to Berry in June, 1824, under the judgment; and this issue came on for trial on Tuesday morning.

To prove payment, a circumstantial chain of testimony was exhibited. An order drawn by Berry on the constable, in favour of the late William Delany esq.; the note and protest on which the action was brought, a general release between Delany and the defendant, were in the hands of the defendant. Several checks drawn by the plaintiff in favour of Berry, were produced. Also the petition of Berry, lately filed, in which the present claim was not returned among his property.

Upon these circumstances, the defendant rested his case of payment. Verdict for plaintiff, on Wednesday morning, for 128 dollars—the whole amount of the claim, with interest.

For plaintiff, *W. L. Hirst & J. M. Broom Esqrs.*; for defendant, *Archibald Randall Esq.*

"A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES—comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania, and Virginia: With the Decisions on Cases arising upon those Statutes: Together with the English and American Authorities upon Criminal Law in general. BY FRANCIS WHARTON." 1846.

FOR this valuable work the profession is indebted to the ability and industry of Mr. Wharton, who was associated with the Hon. Judge KANE, during the attorney-generalship of that gentleman, in conducting the pleas of the commonwealth for the city and county of Philadelphia, and to whom it is appropriately dedicated. Although forming a closely printed octavo of nearly seven hundred pages, we have found time (the publisher having favoured us with an early copy), to give it a careful examination; the result of which enables us with confidence to congratulate the American practitioner that a void which has heretofore existed in this department of his studies, is at length satisfactorily filled.

It is not a little remarkable, that the only previous American treatises upon Criminal Law, those of Mr. Barbour, of Mr. Daniel Davis, and of Mr. I. A. T. Davis, are (as Mr. Wharton notices in his preface), "devoted to an examination of the duties of Justices of the Peace; and valuable as they are in the practice of the state to which they are adapted, cannot be considered as going further in the elementary exposition of criminal law, than is necessary to a proper consideration of their particular topics." The work of Mr. Daniel Davis contains indeed, in addition to a preliminary inquiry as to the office and duties of grand jurors, a copious and we believe valuable collection of Precedents of Indictments; but neither it nor either of the other works named, afford the information which is indispensable to the successful practice of the criminal law in the United States.

In the absence, then, of any treatise expressly adapted to the wants of the American profession, the practitioner here has been compelled to rely upon the four leading English works on criminal law—those of Chitty, Russell, Archibold and Roscoe. But these, though admirably designed and executed, particularly Mr. Russell's invaluable work on Crimes and Misdemeanors—and everything that could possibly be desired by the profession *in England*—fall far short of supplying the necessities of the practitioner on this side of the Atlantic: and though the American reprints have undergone the elaborate revision of able gentlemen, who have sought to supply the deficiencies alluded to by copious references, in foot notes, to the decisions of our own tribunals, they were still too extensive to admit of being thus remedied.

What, alone, could remove the evil, was a treatise prepared with express reference to “the criminal law of the *United States*,” and we need not hesitate to express our entire conviction, that the work now under notice will recommend itself to the profession as the *desideratum* so long called for.

Though want of time forbids our particularizing, as occasion may be taken to do in a future Number, we would call the attention of the reader to the Sixth and concluding book—“Trial and its incidents”—where he will find the subject not only masterly treated, but an amount of information embodied, divided, and digested, in a manner altogether unattempted in any previous work on criminal law, English or American.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SMITH AND SLOAT *v.* MERCER AND PECHIN.

The facts of this case are sufficiently stated in the opinion of his honour JUDGE KANE, as follows:

This case came before the court on bill and affidavits, upon a motion to restrain the defendants, by special injunction, from constructing, selling, and using Woodworth's planing, tongueing, and grooving machine, or any of the parts or combinations thereof.

It was very fully examined and ably argued by the gentlemen who are of counsel in the several cases growing out of Mr. Woodworth's patent-right; and it was agreed, that the evidence adduced in the case of Sloat and Plympton, which was considered immediately after this, should be applied to both cases.

The facts, so far as they are undisputed, are these:

On the 27th December, 1828, letters-patent were issued to William Woodworth, of Troy, in the state of New York, conferring on him exclusive property of his "Improvement in the method of planing, tongueing, grooving, and cutting into mouldings, or either, plank, boards or other material."

The patentee having died on the 9th of February, 1839, letters of administration on his estate were duly granted to his son, William W. Woodworth, by the surrogate of New

York, at which place the father was residing at the time of his death.

On the 29th July, 1842, the administrator applied for an extension of the patent for seven years: and the board of commissioners, to whom the application was referred, under the act of 1836, having certified in his favour, the patent was extended in the name of the administrator as such.

On the 8th July following, the administrator surrendered his letters-patent, in accordance with the provisions of the 13th sect. of the act of 1836, for the purpose of obtaining a renewal upon an "amended specification, describing the invention in more full, clear, and exact terms," and the amended patent issued to him on the same day, under the hand of the secretary of state, countersigned and sealed with the seal of the patent-office, by "Henry H. Sylvester, acting commissioner of patents."

The complainants claim under a grant of the exclusive right within and throughout the county of Philadelphia, made by the administrator, on the 29th November, 1842, and duly recorded.

It is admitted, that the defendants, Plympton and Hogeland, have been using, and they claim the right to use again, a machine, known as Ira Gray's, which effects the same purposes as Woodworth's, and which is alleged by the complainants to be in principle and substantially the same.

Upon these facts, several preliminary questions have been discussed by the counsel for the parties, which I shall briefly consider.

1. It is said, that the administrator had no power to surrender the patent of 1828, after assigning exclusive rights under it, and that the new letters-patent, being founded on such surrender, are void.

It is not easy to see how this objection, if valid, could affect the case before the court. The complainants do not claim under the new letters-patent, but under the old; and these cannot have been invalidated by an unlawful surrender of them.

But it seems to me a mistake, to regard the complainants, or any other persons whose rights have been brought to the notice of the court, as assignees within the meaning of the patent laws.

There are four classes of persons recognised by the 13th and 14th sections of the act of 1836, as parties "interested." These are the original patentees, their executors or administrators, their assignees, and the grantees under them of the exclusive right for a specified part of the United States. These last, by the express words of the 14th section, have the same rights of suit as the patentee or his assignees; and it is by force of this, that the complainants, who are merely grantees of a limited right, are admitted as parties here. But they have no power over the letters-patent: these remain with the party to whom they were issued, or the general representative of his interest; and the power of surrendering them for amendment and renewal is vested exclusively by the 13th section in "the patentee, his executors and administrators, or the assignee of the original patent. The administrator, therefore, upon the facts disclosed, was the only person who could make the surrender and receive the amended patent; and there is nothing in the act of congress which restricts his right to do so, because of his having previously made special or limited grants or licenses.

2. It is said, that the amendments of the specification, as made upon the re-issue of the patent in 1843, do not enure to the benefit of the assignees or grantees under the patent, as it stood before; in other words, that they must stand or fall with the original specification.

I cannot assent to this. The complainants are not grantees of the patent, or any part of it: they are grantees of certain rights, of which the letters-patent are the evidence and definition. If those rights are made more clear and definite (not more extensive) by any new or additional act whatever, from whomsoever proceeding, why shall the complainants be denied the advantage of using that clearer and less equivocal evidence?

This is not the case of a surrender and re-issue with amended specification, where the grantee for a district prefers resting his claims on the specification as it stood when he purchased his right. As where the patentee makes a disclaimer of part of the invention, the prior grantee might in such case refuse to be affected by it. But here the objection comes from third persons: the complainants adopt the amended specification, by making it a part of their bill; and the only inquiry is, as to their

authority for doing so. The question is settled as to third parties by the provision of the act, that the amended specification shall have the same effect and operation in law, on the trial of actions, as though it had been originally filed in its corrected form.

3. The 5th section of the act of 1836 directs that all patents shall be issued under the seal of the patent office, and be signed by the secretary of state, and countersigned by the commissioner: it is argued, that this patent is invalid, because signed by an *acting* commissioner.

Mr. Sylvester, the countersigning officer, was the chief clerk of the patent office at the time; and as such, by the words of the 2d section of the act, in all cases, during the necessary absence of the commissioner, or when the principal office became vacant, had the charge and custody of the seal, records, and other things belonging to the office, and was required to "perform the duties of commissioner *during such vacancy*." It is contended by the complainants, that the words "during such vacancy," apply as well to the case of the necessary absence of the commissioner, as to that of the commissionership being vacant by death, resignation, or removal.

This may be a grave question. I am not prepared to say, that the absence of the commissioner, while he retains his official character, constitutes a vacancy in the office; or that the inferior officer can succeed to or exercise the powers of the principal station, while that station has a lawful incumbent. But I do not regard the question as properly before me, at least at the present stage of the cause. I recognise the signature of the secretary of state, the public seal of the patent office, and the countersignature of a person who has the custody of it during the absence of the principal commissioner, and the right to use and attest it in a certain contingency. I find him designating his official character for the time, by words that imply his legal substitution to the duty in question. There is no allegation of fraud or usurpation on his part: on the contrary, his act is sanctioned by the commissioner now acting in person.

It would be too much for me, in an interlocutory proceeding like this, to deny the validity of these letters-patent. I am inclined rather to adopt for the time the language of Judge Story

(in the case of *Woodworth v. Stone*, 1st Circ., May T. 1845), on a question not unlike the present, and take the countersignature, as he did the re-issue of the patent, "to be a lawful exercise of the officer's authority, unless it is apparent on the very face of the patent that he has exceeded his authority."

4. It is contended, that the grantee of a right under letters-patent, cannot maintain a suit in a circuit which forms part of Pennsylvania, if he derives his title through a foreign administrator.

This idea refers itself to the local laws of Pennsylvania, which as it seems to me, have no application to the case. By the act of 1836, "*all* actions, suits, controversies, and cases" whatever, arising under the patent laws, are without any exception originally cognizable in the courts of the United States; and it has been held in the only case in which the question has arisen (*Parsons v. Barnard*, 7 Johns. 144), that this jurisdiction is exclusive. The right, which is vested by letters-patent, has its origin in the patent-laws, and is transferrable and transmissible according to their provisions. On the death of the patentee in this case, it passed under them to his administrator; and as it was a personal right, the administrator constituted by the forum of the domicile became liable to account for it. If the right has been since violated, he may sue for damages in his own name, as for a wrong to his possession: if he has sold it in whole or in part, he may recover the price in his own name, as for a breach of contract with himself; *Grier v. Huston*, 8 S. & R. 402; *Wolfersberger v. Bucher*, 10 S. & R. 13. I cannot doubt, therefore, that William W. Woodworth, the administrator, to whom the letters-patent passed upon the death of the patentee, might himself have maintained an action in the circuit court for a breach of the patent right, without taking out new letters of administration in Pennsylvania.

Still less can I doubt the power of this court, to interpose by injunction in such a case, to prevent an intended violation of right. It would be almost equivalent to a judicial repeal of the letters-patent upon the death of the patentee, to affirm that the restraining action of the courts shall have no operation beyond those of the twenty-eight or thirty states, in which the patentee is represented by a local administrator.

But were the law in this particular otherwise than as I believe it to be, it is by no means true, that the incapacity of a foreign administrator to sue, implies the same consequence to his alienee. On the contrary, it has been expressly declared by the highest of our courts, that where a plaintiff's title is derived through a foreign administration, it may be asserted in a judicial proceeding here, without constituting a domestic administrator; *Trecothick v. Austin*, 4 Ma. 35-6; *Harper v. Butler*, 2 Pet. 239.

5. A good deal of evidence was adduced to show that the amended specification describes a different improvement from that which is embraced in the original patent: and it was argued, that the amended patent was invalidated by the variance.

This, however, on the authority of judge Story, in a case affecting this very patent, (*Woodworth v. Stone, ut supra*), I do not regard as open to question at this time. "It appears to me," he said, "that *prima facie*, and at all events in this stage of the cause, it must be taken to be true that the new patent is for the same invention as the old patent; and that the only difference is, not in the invention itself, but in the specification of it. * * * For the purpose of the injunction, if for nothing else, I must take the invention to be the same in both patents, after the commissioner of patents has so decided by granting a new patent."

Though thus relieved from the necessity of passing upon the question, I feel bound to remark, that the evidence has not satisfied me of the fact it was intended to establish. The very title of the patent, in the words of the inventor, "his improvement in the method of planing, tongueing, and grooving, *or either*," and the expression in the body of the specification, that after the planing is completed, the tongueing and grooving apparatus is to be used "*if required*," indicate to me that the patentee had in his mind from the first, a machine of several parts or systems, which could be used separately or in combination, as his administrator has developed more fully in the amended specification. So too, his omission to declare in the first specification, that he employs rollers for retaining the board in its place while planing, though fully set out in his amended specification, cannot, in my view, support the idea that the inventions described are

not essentially the same. The rollers, which he refers to in the first specification, and which are more unequivocally shown in the drawing annexed to it, as giving motion to the board, would almost necessarily perform the double office: besides which, there are other devices well known to mechanics, which could be conveniently adapted to the object. I see nothing in the two specifications, which could justify me in referring them to different machines.

These preliminary objections being disposed of, three questions present themselves:

1. Was William Woodworth the inventor of the machine, for which he obtained letters-patent in December, 1828?

2. Has he had, since the issuing of the letters-patent, such an exclusive and continued possession under them; or have his rights as patentee been so vindicated by judicial action, as to claim for him the summary intervention of equity at this time for his protection and repose?

3. Is the machine now made or used by the defendants the same in principle and substance with the machine so patented, or with any material and distinguishable part of it?

1. 2. The two first of these questions have been so often decided in the circuit courts of the United States, as to dispense with the consideration of them at this time. In the case of *Van Hook against Scudder*, in the circuit court for the southern district of New York, in 1843; and in another case in the northern district of the same state; in that of *Wilson v. Curtis* in the fifth circuit, Louisiana district; in *Washbourn v. Gould*, in the first circuit, before judge Story, at May Term, 1844; and in twenty other cases decided summarily, immediately afterwards by the same judge; and again, in *Woodworth v. Stone*, at May Term, 1845;—in all of these, and in numerous other cases which have been alluded to in the arguments, the Woodworth patent has been recognised as valid, and the claimant under it as entitled to protection by injunction.

Two cases only have been mentioned, as implying a different opinion. The first is that of *Woodworth v. Wilson*, in the circuit court for Kentucky, where an injunction which had been granted was dissolved after more full hearing. But in this case the decree dissolving the injunction was reversed by the

supreme court at its last session, and a perpetual injunction directed.

The other case is that of *Richards v. Swimley*, on the equity side of this court, No. 1, of April sessions, 1841, in which judge Hopkinson is supposed to have refused an injunction to claimants under the Woodworth patent, against a person who used a machine closely resembling that of these defendants. But an inspection of the record shows the supposition to be mistaken. The bill in that case was filed on the 4th November, 1840; and notice was given of a motion for an injunction, to be made on the 14th. On that day the complainants filed two affidavits, which defined the infraction to consist in the use of Woodworth's tonguing and grooving apparatus, making no mention of the machinery for planing. It does not appear that the motion was ever heard; and on the 16th, two days after the time noticed for making it, it was withdrawn by the complainants; since which no proceedings have been had in the cause. The right of the complainants in the machine expired in 1842. No judicial opinion on the part of judge Hopkinson can be inferred from these facts; and I am left therefore to the concurrent judgments that have been pronounced in other circuits.

I may add, that my own very careful examination of the different inventions, that are supposed to interfere with Woodworth's, has not led me to a different conclusion from that which a proper judicial comity invites me to adopt.

3. The only remaining question is that which regards the substantial identity of the machine used by the defendants with that patented by Woodworth.

The patent of Woodworth, as defined in his amended specification, is for a machine, capable of performing the operations of planing, tonguing, and grooving, at one and the same time, but which admits of their being performed separately. It consists essentially of two parts or systems; one for planing or smoothing the surface; the other for fashioning the tongue and groove upon the edges. The apparatus for feeding the machine, and the rollers by which the elastic material is held firm while undergoing its action, are subsidiary to these.

I shall consider the two systems of machinery in succession.

1. The planing machine.

A practically smooth surface may be given to plank or other

substances, by the application of either of three forms of tool ;—the chisel, which, with a guage to regulate its action, becomes the ordinary plane ; the drawing-knife, which, with a similar guage, forms the spoke-shaver ; and the adz. Each of these has its appropriate or characteristic motion ; though by the ingenuity of the workman, the motion of either of them can be modified so as to approach that of another.

The chisel, when in the form of the plane, has its blade fixed at an acute angle with the surface to be reduced, and works parallel to that surface, the edge cutting generally at right angles.

The guaged drawing-knife differs from the plane in this ; that by means of its two handles, its edge can be made to cut obliquely or at right angles, at the pleasure of the workman. Its general motion is parallel to the surface ; though, being more under control of the hand, and having its blade sometimes slightly arched, it may be made to deviate upwards or downwards, with a varying angle, or in a curve.

The adz has an arched edge, and cuts only in curves ; the level surface being attained proximately by a succession of such cuts. The plane and drawing-knife operate by shaving the surface, the adz by chipping.

The chisel-plane was combined with apparatus for giving it motion and direction, in the machines of Bentham, in 1791, Bramah in 1802, and Muir of Glasgow, in 1837. In the first and the last of these, the character and direction of the motion were those of the same tool when worked by hand. In Bramah's, the planing-blades or irons were fixed upon a revolving disc ; the character of the motion thus becoming circular, but still continuing to be parallel with the surface.

The planing machine of Woodworth, though it uses knives or cutters resembling plane-irons in form, is essentially a series of adzes. These are attached to the outside of a cylinder, in lines either parallel or oblique to its axis ; and as the cylinder revolves, they cut with an adz-like or dubbing motion ; the knife which is parallel to the axis, presenting its whole edge to the plank at the same moment, and in this respect cutting like the plane ; the knife which is oblique or in the helix form, presenting the parts of the edge in succession, and in this respect cutting like the drawing-knife ; but both forms of knife

cutting in vertical curves like the adz, not in plane surfaces like the chisel-plane, and its combinations by Bentham, Bramah, and Muir.

Regarding then the Woodworth machine as substantially different from the three last mentioned, I find the substantial difference to consist in this, that they act in planes parallel to the surface to be removed, Woodworth's in vertical curves; that their's produce an absolutely level surface; his a surface apparently level, but in fact corrugated or grooved.

2. The tongueing and grooving machine.

The idea of tongueing and grooving by modifications of the circular saw is at least as old as 1793, when it was described by General Bentham, from whom Muir copied his machine many years after. The specifications of the two concur in describing a thick revolving saw or cutter to make the groove, and two wheel-saws set at right angles with each other on each side the plank, making four in all, to cut the rebates of the tongue. The machine of Woodworth is an improvement on these, by substituting a single firm cutting wheel for the four circular tongueing saws, and combining this with the equally firm grooving cutter on the other edge of the plank, to reduce it to an exactly equal width throughout.

I do not see an essential difference between the grooving cutter in this machine, and the circular saw or cutter described by Bentham and Muir. But their tongueing apparatus is clearly not the same as Woodworth's; and I doubt very much whether the tongueing and the grooving could be practically combined in their machines, with the same effect as they are in his: they certainly are not.

These two systems of machinery, the planing, and the tongueing and grooving, seem to me to constitute the essential, and only essential parts of the Woodworth improvement. The amended specification claims them, in the several combinations of which they are susceptible, as follows:

1. The employment of the rotating planes, in combination with the subsidiary rollers, or any analogous device:
2. The combination of those planes with the tongueing and grooving wheels:
3. The combination of the tongueing with the grooving apparatus:

4. The combination of either the tongueing or grooving wheels with the rollers, which by their pressure hold the plank steadily in its place.

Having thus analysed the patent-right under which the complainants claim, it remains to determine whether the machine used by the defendants is in part or in whole substantially the same.

And, 1. Of the planing machine.

It is apparent, that so soon as a planing machine, having a general resemblance to the revolving disc of Bramah, ceases to operate in an absolutely plane surface, it loses one of the characteristics of his machine.

On the other hand, it is clear, that a machine, sensibly like Woodworth's; may not exactly conform in its structure to the rigid definition of a cylinder. The smallest change of diameter between the two ends of the revolver, on which the planing knives are placed, would convert the cylinder into the frustrum of a cone; and a corresponding inclination of the axis of motion, or a corresponding adjustment of the plank to be acted on, would make the machine operate as well, or nearly as well, as if the exact character of the cylinder had been retained.

Yet, just in proportion as the sides of the Woodworth revolver approximate to a cone, the machine approaches the planing disc of Bramah. It ceases to cut as the adz merely, but takes in some degree the characteristic action of the chisel-plane or the drawing-knife.

So, too, when you give a *dished* form to the disc of Bramah, thus converting the disc into a cone, you lose in part the characteristic action of the chisel-plane and drawing-knife, and introduce in the same degree the appropriate motion of the adz.

This deviation from the strict form of the Woodworth machine towards that of the Bramah, or from the Bramah towards the Woodworth, may go on increasing, till the appropriate action of the original machine effectively disappears; the cylinder, by a series of progressive changes, having lost itself in the disc, or the disc in the cylinder. It is impossible to define, for the practical objects of a judicial decree, that angle or degree of deviation at which one of these geometric forms shall be said to pass into the other.

Between the two machines then, the Bramah, unprotected by a patent in this country, which cuts parallel to the surface with a planing motion, and the Woodworth, which cuts with the dubbing action of the adz,—where is the line of separation? Obviously, it is at the point of the first deviation from the free machine to that of which the use is prohibited.

Turning now to the machine used by the defendants, we find it to be a revolving cone, its axis or spindle so arranged as that the tangent plane of its curve shall coincide with the surface to be made smooth. It partakes of the disc character, and cuts as the drawing-knife and chisel-plane also; but just so far as it varies from the simple disc of Bramah, it embraces the principle of Woodworth's machine, by involving the dubbing action of the adz. It cuts as the drawing-knife and the plane, while approaching the point at which the knives act upon the finished surface, and its cutters continue to revolve with a similar motion after passing that point; but at the effective moment, it is not the plane or the drawing-knife, but the adz cut, that finishes the work.

Much stress has been laid upon the fact, that the knives in the defendant's machine are not in the lines of the radius, but have a certain obliquity, which brings one part of the edge in contact with the board before the rest, and gives a sloping or drawing action, not unlike that of the pocket-knife while cutting a stick. But I see nothing in this action or arrangement, to distinguish it in principle or substance from that of the Woodworth rotary cutter, when placed in the oblique line of the helix. Whether it be the knife, that moves in part lengthwise during its revolutions, presenting the points of its edge to the board in succession, or the board, which moving onwards, presents its face to the several points in succession of the knife edge, or whether the action results from the combined motion of the two, the machine and its mode of operation are substantially the same.

I am therefore of opinion that the planing machine of the defendants is an infringement of the complainant's patent-right.

2. As to the tongueing and grooving machine.

This part of the machine in use by the defendants does not vary sensibly in form or character from the tongueing and grooving apparatus claimed by Woodworth. Until his patent shall be invalidated, he has a right to claim of this court the protection of its restraining process in regard to this also.

It is my duty, therefore, to grant the full injunction as prayed for. In doing so, I am not insensible to that which was so ably pressed in argument, that if I am in error, the respondents may be seriously prejudiced. But the court can seldom encounter a case, that does not involve a similar responsibility for consequences. To withhold judicial action is not to escape from this. The right of a party to the most speedy and effectual protection against a meditated wrong, is as complete as his right to redress for wrongs already inflicted; and the accident of position confers no right on one party, whether he be plaintiff or defendant, at the expense of the other. The special injunction of equity, like the arrest on mesne process of the law, may be abused to the injury of an opponent; but it is no less on that account the duty of the judge, to further them both, when in the exercise of his best discretion, he believes that they are called for by the merits and the exigency.

This is a case of an ancient and highly important patent-right. It has been contested at law and in equity with an eagerness and pertinacity proportioned to its value. Yet during the lifetime of the inventor, eleven years, it was "never successfully impeached;" Story J., in *Washbourn v. Gould*. Since his death, numerous questions have been raised as to the title of his administrator under the renewal of the patent, which were only settled by the supreme court within the present year. It is under the decision of that tribunal, in the case of *Wilson v. Rousseau*, that the claimants assert their right to come before this court as parties in interest.

They have lost no time. The decision at Washington was made in March, and they filed their bill in April. The motion for an injunction, argued before my predecessor in office, and left undecided by his death, was brought to my notice on the day I first took my seat on the bench. There is here no acquiescence, no laches; but on the contrary, all promptness and vigilance.

I accordingly direct a special injunction to issue according to the prayer of the bill, and to remain until the hearing of the cause, or the further order of this court.

For complainants, *Mr. G. W. Biddle* and *Mr. Meredith*.

For respondents, *Mr. Guillou* and *Mr. Williams*.

IN THE COMMON PLEAS OF CHESTER COUNTY.

[Sept., 1842.]

JORDON ET AL. v. MINSTER.

1. Though, generally, parol evidence is inadmissible to contradict or vary a written contract, record, or sheriff's return of a writ, yet in all these cases, proof of facts consistent with and not appearing on the face of the contract, record or return, may be heard.
2. The sheriff made return to a *ca. sa.*, "proceedings stayed by order of plaintiff's attorney." Held, on a motion to set aside a subsequent *fi. fa.*, founded on the same judgment, that the defendant might prove by parol that he had been arrested by virtue of the *ca. sa.*, and afterwards discharged; the proof of such fact, not being inconsistent with the return.
3. In such case the discharge operates to extinguish the debt, and a subsequent *fi. fa.* to levy it, will be set aside.

The plaintiffs having recovered a judgment against the defendant, in this court, issued a *capias ad satisfaciendum*, which was returned by the sheriff, "proceedings stayed by order of the plaintiff's attorney." Afterwards a *fieri facias* sur the same judgment, was issued and placed in the hands of the sheriff. Before its return, the defendant obtained a rule to show cause, why it should be set aside, on the averment that he had been arrested by the sheriff, by virtue of the *ca. sa.*, and, subsequently discharged. On the argument of the rule, he offered to prove by parol his arrest and discharge. To this the plaintiffs objected, on the ground that the proof offered, contradicted the return of the sheriff, or at least, altered it materially, and was, therefore, inadmissible. The court admitted the evidence, reserving the question of its legal effect.

Darlington argued for the plaintiffs against the rule, and cited *Snyder v. Snyder*, 6 B. 489; *Brownfield v. Commonwealth*, 13 S. & R. 267; *Scott v. Seiler*, 5 W. 242; *Mentz v. Hammond*, 5 Wh. 150; *Diller v. Roberts*, 13 S. & R. 60; *Blythe v. Richards*, 10 S. & R. 266.

Smith and *Lewis* for the defendant, cited *Little v. Delany*, 5 B. 266; *Beale v. Commonwealth*, 7 W. 183-7; *Hyskell v. Givin*, 7 S. & R. 369; *Beale's Executors v. Commonwealth*, 11 S. & R. 299; *Commonwealth v. Rees*, 2 Wh. 266; *Weidman v. Weitzel*, 13 S. & R. 96; and *Snively v. Reed*, 9 W. 396.

BELL, president, delivered the opinion of the court :

It is conceded that this rule must be made absolute, if the

parol testimony offered by the defendant, from the mouths of the late sheriff Irwin and his deputy, Nelson Taylor, was properly received; because it is proved by them that the defendant was arrested and held in custody by the sheriff, by virtue of a *capias ad satisfaciendum*, issued to February term, 1836, upon the same judgment which is the foundation of this *fi. fa.*, for the purpose of making the same debt. It is said, and there is some proof of it, that he was afterwards discharged from custody by order of the plaintiff's attorney. But whether this be so or not, can make no difference in the decision of the present question, for the arrest under the *ca. sa.*, without more, operated to discharge and extinguish the debt; 2 Tidd's Pr. 956-7; 4 Burr. 2482; 6 Term R. 526-7; 7 id. 420; 1 id. 556; Barnes 205; 2 East 243; Snavely v. Reed, 9 Watts 396. But admitting this to be so, the sheriff having made return to the *ca. sa.*, that the proceedings were stayed by the plaintiff's attorney, it is insisted the parol proof of the defendant's arrest ought not to have been received, because it tends to contradict the return. As a general rule, it is unquestionable, that parol evidence is not receivable to contradict or vary a written contract, a record or a sheriff's return. But in all these instances, proof of facts, consistent with and not appearing on the face of the contract, record or return, may be heard. Thus in debt on bond conditioned for the payment of a certain sum, after the death of the obligor, the defendant pleaded the marriage of the obligor and the obligee. It was held that the averment of a replication, that the bond was given in contemplation of marriage and with intent, that if the plaintiff survived her husband she should have the benefit of it, was consistent with the terms of the bond, and therefore admissible; Milbourne v. Ewart, 5 T. R. 381. So although a party to a deed, cannot aver a consideration contrary to that expressed in the deed, he may allege another consistent with that expressed. As where a conveyance is mentioned to be in consideration of natural love and affection, and other considerations, proof may be given of a money consideration, for this is consistent with the deed; Starkie Ev. part 4, 1004; Peacock v. Monk, 1 Ves. 128; Benedict v. Lynch, 1 John. Ch. Rep. 370. And the rule is the same, and for the same reason, where *no* consideration is expressed; Peacock v. Monk, *supra*; Davenport v. Mason, 15 Mass. Rep. 92;

See also *Jackson v. Dougherty*, 3 Watts 151. A record is subject to the same rule, for though an averment which goes to contradict it, is inadmissible, yet when it stands with the record and falsifies no fact appearing on its face, it is permitted; *Aynd's case*, 4 Rep. 71. An instance of this is furnished by the case of *Siddon v. Tulup*, 6 Term R. 607, where in assumpsit for goods sold, the plaintiff pleaded a former recovery and showed the record of a prior action to recover a promissory note, and for goods sold. The plaintiff was permitted to prove that no evidence was given, in the first action, under the second count for goods sold, and therefore, no recovery under it; although the record was, *prima facie* evidence of recovery under both counts. To the same effect is the case of *Wilson v. Hamilton* in our own courts; 9 S. & R. 429. In the particular instance of a sheriff's return, the authorities are, if possible, still more clear, distinct, and conclusive. In a recent case, the rule is thus stated, by the supreme court of Pennsylvania. A party cannot aver matter directly at variance with the facts stated in the sheriff's return, contradictory to it and showing it to be false; but he may make an averment consistent with it, or explanatory of its legal bearing and effect, where the return is at large or general; *Knowler v. Lord*, 4 Whart. 504; 19 Vin. 198. Thus when in replevin, the sheriff was commanded to replevy certain goods, particularly described, and he returned "Replevied," the party was not permitted to show that, in fact, the sheriff did not replevy all the goods mentioned in the writ; *Knowles v. Lord*, *supra*. Where a sheriff returned a *scire facias sur mortgage* "served," the defendants were not admitted to contradict it, by showing it had not been made known to them, among others; *Blythe v. Richards*, 10 S. & R. 261. So after a return of "*non est inventus*" to a *ca. sa.*, proof will not be heard that the defendant in the writ, was arrested and discharged by the plaintiff; *Wilson v. Hurst's Exr's.*, *Peters' Rep.* 441, for in all these cases the parol averment went directly to falsify the return.

But when the sheriff returned, generally, to a *fi. fa.*, that he had levied the goods of the defendant, without returning the value, he is not precluded from going into proof of their value to show that it was not sufficient to pay the debt, or to satisfy the lien of prior executions; *Little v. Delany*, 5 Binn. 266;

Beale's Ex'rs. *v.* Commonwealth, 11 S. & R. 304; Same *v.* Same, 7 Watts 187, 188; although the presumption in such case, is that he levied to the value of the debt; for evidence of the value of the goods does not contradict any fact stated in the return. The extent to which evidence, explanatory of the legal effect and bearing of a sheriff's return, is permitted, is strongly shown by the case of *Dolan v. Briggs*, 4 Binn. 498-9. There a decree had been made for the sale of a schooner, with all and singular her tackle, apparel, and furniture, or so much thereof as might be necessary. A precipe of sale issued to the marshal, in accordance with the decree, and he returned that he had sold the schooner, her tackle, apparel, &c. In replevin for the sails of the vessel, the plaintiff was permitted to prove that the sails were not sold, because as the return did not particularize the articles which were sold; it might very well consist with it that part was sold and part was not sold, and therefore, the evidence was not in contradiction to the return.

In the instance before us, the sheriff might have returned, without any repugnancy, that he had arrested the defendant and had him in custody when the plaintiff's attorney stayed proceedings on the writ, and the prisoner was discharged. If so, I can see no objection to proof of the fact of the arrest and discharge. If it would not be repugnant, forming a part of the return itself, how can it be said to be in contradiction of and variant from the return as made; and if it be not contradictory, we have seen that it may and ought to be received. It is an independent fact, consistent with the fact stated by the sheriff, for it is not to be doubted but that the plaintiff's attorney may stay proceedings on an execution, after the arrest of the defendant, and the effect of it is to discharge him from custody. Suppose the defendant had offered to prove, that pending the *ca. sa.*, he paid to the sheriff the debt and costs, upon which the plaintiff stayed proceedings, can it be for a moment doubted but that his offer would have been received, although the sheriff returned "proceedings stayed," without more? And why? because the party may have stayed proceedings, and so the sheriff's return be strictly true; but yet it may be also true, that the defendant paid the money to the sheriff, before the stay. The one fact is entirely consistent with the other, and so is the fact proved here, of prior arrest.

But it is said that the legal presumption arising from this return is, that the plaintiff interfered to stay proceedings, under the writ at the first moment of its existence, or, at least, before the sheriff had taken any steps towards its execution. This position may well be controverted, but admitting it to be so, we have seen that legal presumptions arising from a record or sheriff's return, may be rebutted by parol proof, and that such evidence is excluded, only, when it directly tends to contradict a fact found by the record or stated in the return; *Siddon v. Tulup, supra*; *Wilson v. Hamilton, supra*; *Little v. Delany, supra*; *Beale's Ex'rs. v. Commonwealth, 11 S. & R.*; *Same v. Same, 7 Watts.*

It having been shown that the defendant was taken in execution for the same debt, now sought to be made under the *fi. fa.*, and that, therefore, the judgment is satisfied; the rule must be made absolute, and the *fi. fa.* set aside.

[June, 1846.

BATTEN *v.* TOWNSHIP OF BRANDYWINE, OTHERWISE CALLED
WEST BRANDYWINE.

1. A township is a corporation, represented in its corporate capacity by its supervisors of roads and highways.
2. In all questions, in which the supervisors may be called to act on behalf of the township, which require deliberation, experience and the exercise of judgment, all must act, otherwise the township is not bound.
3. A contract for opening a new road within the township, is an act requiring deliberation and judgment, and therefore, the act of one supervisor only, without the concurrence of his fellows, making such contract, is void as against the township.
4. The law is the same of a contract, made under the act of 16th April, 1838, for keeping in repair the roads and highways.
5. Nor does it make any difference, that according to a custom which had obtained in the township, that section of the township in which the new road lay, had, by the supervisors been allotted to the special supervision of him who made the contract.

This was a case stated for the opinion of the court.

It was argued by *Smith* for the plaintiff, who insisted, 1. That it was competent to one supervisor to open and repair the roads within his township, and therefore, he had authority to

enter into binding contracts, for such purpose; and 2. That the eastern division having paid its proportion of the contract price of opening and repairing the road in question, the plaintiff might maintain an action against the western division, now constituting a distinct township; otherwise the plaintiff was without a remedy. He cited, *Barnet Township v. Jefferson County*, 9 W. 166.

Darlington for the defendant insisted, 1. That the contract was utterly void, as against the original township of Brandywine, and 2. That, however this might be, the division of the township destroyed the original corporation, and, consequently, no action lay against West Brandywine (so called), which was a new corporation. He cited the several acts of assembly, regulating roads, &c. *Cooper v. Lampeter Township*, 8 W. 125; *Downing v. Reyer*, 21 Wend. 178; *Hall v. Canal Commissioners*, 9 W. 470.

The following opinion of the court was delivered by

BELL, President: Henry Weidner and John Forbes were duly elected supervisors of roads and highways in the township of Brandywine, for the year 1840. Prior to their election, a public road, in the eastern end of the township, had been duly laid out and ordered to be opened by the court of quarter sessions of this county. Weidner, one of the supervisors, acting for the eastern section of the township, divided the route of the new road into sections, and through and by means of a public vendue held in the spring of the year, 1840, contracted with the plaintiff, Batten, to *open* and keep in repair, for the space of one year, three of these sections, numbered one, three and seven, for certain ascertained sums of money; which contract was reduced to writing. Forbes, the other supervisor, was not present at the vendue, nor did he, in any way, participate in the arrangements made by Weidner, in respect to this road. No notice was given, at any time, to the rated inhabitants of the township, in pursuance of the 34th section of the act of 15th April, 1834, so as to give them an opportunity to work out their respective taxes, by assisting to open and make the new road. The township of Brandywine was, at the time of the vendue and when the road was opened and kept in repair by the plaintiff, subject to the provisions of the 20th section of the act of 16th April, 1838, directing the supervisors of highways, in the several

townships, within ten days after their election, to lay out the public roads, in their respective townships, into sections, and to let out each section, on contract, at public vendue, to the *lowest and best bidder*, to be kept in repair for the term of one year; but if any section should not be thus let, on account of no bid having been made for the same, the supervisors were, then, to let out such section on private contract. The plaintiff duly performed his part of the contract, by *opening*, making and keeping in repair, the new road, for the term of one year. Afterwards, to wit, in the year 1844, by proceedings duly had in the court of quarter sessions, the township of Brandywine was divided into two parts, which have since been known as East Brandywine and West Brandywine, these designations having been assumed by the inhabitants of the respective sections of the divided township. East Brandywine having paid its proportion of the sums stipulated to be paid to the plaintiff, by his contract with Weidner, this action is brought against West Brandywine (so called), to recover the balance.

The first question which presents itself for solution, is whether if the township of Brandywine had remained undissevered, maintaining intact its original corporate capacity, this contract, made between the plaintiff and Weidner, one of its supervisors, could have been enforced against it?

By the act of 15th April, 1834, the several counties and townships of this state are erected into bodies corporate, and these corporations are to be represented and their corporate powers exercised by the commissioner and supervisors thereof, respectively. By the act of 28th February, 1835, each township is to elect two supervisors, annually, who are charged with all the duties, imposed by law, on supervisors of public roads and highways.

In strict analogy to the principles settled by several previously adjudicated cases, it was determined in *Cooper & Grove v. Lampeter Township*, 8 W. 125, that, under the act of 1836, which prescribes the duties of supervisors, in respect to the roads and highways within their respective townships, it is incompetent to one only of them, to transact any business or to enter into a contract, which from its nature and for the promotion of the interests of the township, requires deliberation and consultation. It is, there and elsewhere, recognised as a set-

tled principle of our law, that where delegated business requires deliberation, consultation and judgment, one of two or more agents cannot do it without, or against the consent of his associates, unless so authorized by his constituents. In all such cases, the inhabitants of counties and townships, whose interests are to be promoted and protected, have a right to the counsel and judgment of all to whom the law commits the execution of a public trust. These public agents, whether they be county commissioners or township supervisors, are to meet as a board and act as a board, and where there are but two, less than two cannot decide nor act. It is true that, in the performance and discharge of duties strictly ministerial, a different rule prevails. Where the act to be done is, simply one of a duty prescribed, consisting in a known and settled routine, requiring neither deliberation, nor admitting of diverse conclusions drawn by different judgments, and the performance of which might be enforced by a *mandamus*; less than the whole number, constituting a board of public agents, may legally act. Such is the illustration in the case of supervisors, put by Mr. justice Rogers, in the case just cited of the ordinary and periodical repair of roads and bridges, rendered necessary, either by the lapse of time or sudden disaster.

Conceding, then, that the supervisors of Brandywine township, had a right to enter into such contracts as are set out in this case stated, for *opening* the road in question, without first calling upon the rated inhabitants, in pursuance of the act of April, 1834; the decision of the question under consideration resolves itself into the inquiry, whether the act of entering into these contracts, was a purely ministerial one, or one requiring deliberation and the exercise of a sound judgment? If the former, the township is bound by the act of one of its agents, alone, but if the latter, it is not so bound. In such case, as has been already said, the people had a right to the benefit of a consultation and conclusion upon the premises submitted, the result of the concurring judgment of both their supervisors. The attempt of one of them to bind his constituents is void, for corporations, like natural persons, are bound, only by the acts and contracts of their agents, done and made within the scope of their authority. If the agent of a corporation, make a contract beyond the limits of his authority, although he, himself,

may be bound in the same manner as the agent of a natural person would be, yet the corporation is not bound;" S. C. id. 128. Nor can the other contracting party complain of this, for every person, dealing with a public agent, is presumed to know the extent of his authority.

Now, if we look to the contracts upon which the plaintiff relies, simply, as contracts for *opening* the new road, without more, I think no doubt can be entertained of the character of the act which led to them. It does not present the ordinary case provided for by the act of 1836, of employing, overseeing and directing a sufficient number of labourers to execute, promptly and effectually, the provisions of the law, and the orders of the court having jurisdiction, by opening and making the road, and which judge Rogers seems to think, may be considered as a merely ministerial act, requiring neither deliberation nor consultation: it is an attempt to bind the township to pay particular sums of money to a particular individual, for certain services to be performed. Not only was the price to be paid ascertained, but the nature, extent and character of the services to be rendered as a consideration, was fixed by the contract. Besides this, one element which necessarily enters into all such transactions, is the capacity and fitness of the individual contracted with, properly to execute the work undertaken. To determine all these points, required the exercise of judgment, discretion, and perhaps experience, and as the people of the township had a deep interest in their proper determination, they were entitled to the benefit of the joint judgment, discretion and experience of both their supervisors.

But if the inquiry I have propounded be considered in another point of view, I think all doubt as to the nature of Weidner's act must be put to rest. It is conceded that one supervisor cannot levy a tax to pay the debts contracted and expenses incurred by the township. The consent of both is required, because it is a deliberative and not a ministerial duty. How then can one supervisor do that indirectly, which he cannot do directly, by entering into contracts, binding the township to the payment of specific sums of money, which must require the levy of a certain amount of tax for their disbursement? To invest one supervisor with the power to do this, would enable him, conclusively, to bind the discretion of his colleague, by

leaving no other alternative than to acquiesce in the necessity, the judgment of one alone had created. This question, was put by judge Rogers in the case so frequently cited—and from which it will be perceived most of the reasoning upon which this opinion is based, has been drawn—and it remains unanswered, as I think, it is, unanswerable.

But the contracts in question present another feature, not yet brought into view. They are contracts, not only to *open* the road, but to keep it in *repair*, for the term of one year. So far as they relate to repairs, they were made under and in pursuance of the 20th and 21st sections of the act of April, 1838, which, as we have seen, was then in force in the township of Brandywine. Now it surely cannot be contended that the provisions of these sections, which require the supervisors to divide all the roads of the respective township into sections, to fix upon a day for letting them on contract by public sale, to allot each section to the lowest and *best* bidder; and to let upon private contract, all such sections as may remain unsold; can be executed by a single supervisor. These acts, all require deliberation and judgment, and particularly that which looks to the selection of the best bidder. If it were, then, even competent for one supervisor to make a binding contract for the *opening* of a new road, the present contracts would be invalid, as against the township: for the sums stipulated to be paid to the plaintiff, being for the joint service of opening and keeping parts of the road in repair, it is impossible to separate it into parts, and consequently the whole is void. This general result is not affected by the fact stated in the case, viz.: that the supervision of the eastern end of the original township had been assigned to Weidner, in accordance with long established custom in that township; as is shown by the case of Cooper et al. v. Lampeter Township. This view, which shows the contracts made with the plaintiff to be void as against the township of Brandywine, or any portion of it, renders it unnecessary to consider the other grave questions raised on the argument.

Judgment for the defendant with costs.

IN THE ORPHANS' COURT OF BUCKS COUNTY.

IN THE MATTER OF THE PETITION OF FRANEY TITUS.

1. Where a wife (whose husband has deserted her, and contributed nothing to her support for a year or more), becomes entitled to a distributive share of the proceeds of the real estate of her father, the court in the exercise of its equity power, will appoint trustees to take charge of the money and pay to her the interest thereof.

Franey Titus wife of William Titus, presented a petition to the orphans' court setting forth that the real estate of her father George Kealer, deceased, had been valued by an inquest duly held, and that the same had been adjudged to one of the sons at the valuation. That her husband, the said William Titus had deserted her, and refused to perform his marital duties, and asked the court to appoint a trustee to take charge of the money coming to her and pay her the interest thereof, agreeably to the provisions of the act 29th March, 1832, sect. 48, &c.

A rule was granted upon William Titus to show cause why a trustee should not be appointed, and he filed an answer denying the allegation that he had deserted his wife as set forth in her petition.

From the depositions filed in the case, it appeared that Titus and his wife had been separated about a year. That they had two children, both of whom resided with the mother, and that all the support which she had, was derived from her own labour, and the assistance of her neighbours.

The following opinion was delivered by his honour judge KRAUSE:

In Clancy 560, it is asserted on the authority of *Duncan v. Duncan*, 19 Ves. jr. 394, that without desertion or cruel treatment on the part of the husband, his separation from his wife will not raise an equity for her to claim a provision out of her equitable estate. But this in the broad form as their stated, is not applicable to the case here, before the court. There the parties lived separate by consent, a fact admitted in bill and answer. And on the marriage, a settlement of £3000 had been made, which the wife enjoyed; and the prayer was for maintenance during life. But another feature was, that the fund was in trustees and not in question before the court, though under

its control when its interposition might be required to compel the execution of the trust. The facts therefore, brought the case within a distinct class, in which desertion from the country, leaving the wife destitute, or barbarous treatment, by which she is compelled to leave the husband's home, seem to be the only grounds for decreeing her a separate support. The rule issued here to compel the husband to show cause why the share coming to her out of her father's real estate, converted into money by partition in the orphans' court, should not be vested in trustees, belongs to a different branch of equity jurisdiction. Her petition is itself a refusal to let him have it without giving security under the 48th sect. of the act of 29th March, 1832, and he has offered none to entitle him to take it, if he would be allowed to take it at all under the circumstances. The parties have lived separate for more than a year; and according to the evidence, she, with two children, have been dependent for subsistence, as they still appear to be, on her labour and the charity of strangers. She asserts in her affidavit, that he deserted her. This however, is contradicted in his, as an absolute fact, but no contribution from him towards their support is pretended, nor any denial of his living away from them, nor any allegation of misconduct on her part. Contenting himself with a simple negative in his answer of her charge of desertion in a literal sense, he claims to receive the money coming to her from her father's estate. But this he cannot have without the interposition of the court; and the question is, shall he have it by its award, without an imposition of terms in her favour? In note d. to *Bull v. Montgomery*, 2 Ves. jr. 190-1, the answer is given; "Where the aid of the court is required, to enable the husband to take possession of the wife's property, he must do what is equitable by making a reasonable provision out of it, for her maintenance and that of her children; and without that the aid of the court will not be afforded him." And this wholesome principle is recognised and finally adopted as the rule in this state in *Rees v. Waters*, 9 Watts 90, by the emphatic declaration of Mr. justice Rogers, made for the whole court, in which too it is held in full harmony with the statement by Mr. justice Story, of the doctrine in such cases, that such equity is "administered to the wife when she has not been sufficiently provided for as well as when she has been deserted by the husband without a suitable

or adequate support." In sect. 1424, of 2 Story's Equity, "desertion or ill-treatment of the wife by the husband, as well as his inability or refusal to maintain her," are taken alike to be grounds for allowing her aid out of her equitable funds within the jurisdiction of the court. And this is repeated in sect. 1426, with the qualification that distinguishes a case like this from such as *Duncan v. Duncan*, in which the allowance would but be promotive of separations and subversive of the true policy of the matrimonial law. Where such is the object or the effect, no equity is shown by the wife, and of course equity refuses its aid. But when the property is her's and the allowance is necessary to save her and the children from want, it interferes in her favour as a matter of proper duty. The foundation of this jurisdiction is but reciprocal justice. "As the law gives to the husband the wife's property, it imposes the correspondent obligation of maintaining her, and that obligation fastens itself on her equitable estate in the nature of a lien or trust, which, when necessary, the court will enforce in pursuance of this duty; sect. 1424, *ib.*

If indeed, equity were impotent to raise the wife with the children from destitution and wretchedness, when property in her right is about to be awarded by the court, unless in addition to such suffering as the consequence of his delinquency, she furnish proof also of his actual desertion, or proof of such treatment as forced her from his house, to seek alms from benevolent strangers, there would seem to be a signal failure to accomplish the exalted purposes it professes above the common law, as claimed for it by justice Story in his concluding section, on this branch of its jurisdiction. In that case, she must be turned back from the court to her desolation, and he withal take her patrimony to waste it on other objects, if that please his fancy. Here, without aid from him of any sort for a year, and without an apparent care whether she and his children were clothed and fed or not, or whether the latter were trained to good or evil, with no misconduct shown on her part, no offer made to take her back and support her, no inclination indicated to return from his wanderings to his family—the husband yet claims what her father accumulated. If he could take possession without the intervention of the court, the law would protect his title as a marital right, and equity would not interfere. But would any court of

equity appoint a trustee with direction to pay him the interest of the fund? That professes to found its interposition on a regard for married women, their protection, support and relief; on a parental solicitude for infants, on an advancing state of society. On such considerations, "it administers to the wants, and guards the interests, and succours the weakness of those who are left without any other protectors, in a manner which the common law was too rigid to consider, or too indifferent to provide for." But if without any mitigating circumstances being shown, an abandonment by the husband of both marital and parental duties, be not enough to found a claim for her to a provision out of the property in her right and within the jurisdiction of the court, it must be admitted that there is at law an equal solicitude for her helplessness, and at least as effectual remedy for positive wrongs. It has been shown however, that equity vindicates its professions above the common law in this respect, by a practical application of the wife's property within its jurisdiction to her relief and that of the children, in cases where the husband is unable or unwilling to support them, as well as where he is unmanly enough to ill treat and desert her in a state of destitution.

The court therefore, as no objection is made to the manner of getting the case up, appoints Moses Diller, trustee, to take the fund in question, and pay annually to Franey Titus, wife of William Titus, $5\frac{1}{2}$ per cent. annually, of the interest, and pay to him $\frac{1}{4}$ per cent. thereof during the separation, and until the further order of the court in the premises. The trustee to pay the costs of these proceedings out of the fund.

Du Bois, for complainant. *Ross*, for respondent.

UNITED STATES' CIRCUIT COURT, GEORGIA.

[Law Reporter, Oct., 1846.]

JOSEPH ANTONIO PENARO v. ROBERT W. FLOURNOY, ADMINISTRATOR OF ROBERT W. FLOURNOY, DECEASED.

1. Whether the evidence of a promise to pay a debt, barred by the statute of limitations, is sufficient to take a case from the operation of the statute, is a question of law for the court. Whether the evidence applies to the debt in suit, or to what portion of it, is a question of fact for the jury.
- 2, Where A, who was in the employment of B. spoke of leaving, and said, "I

want to see my money;" to which B. replied, "I will put up your wages for you;" it was held, that the promise was sufficient to take the case out of the statute of limitations, for all the wages to which the promise applied, and that it was properly left to the jury to find to what portion of the wages, if any, the promise did apply.

This was an action founded upon an open account, in the following words:—

"R. W. Flournoy, To Joseph Antonio Penaro, Dr.

"For my services on his plantation, from the 15th April, 1834, to 15th February, 1844; 9 years and 10 months, at \$150 per annum, \$1470.

The defendant, among other pleas, relied upon the statute of limitations. The statute of Georgia requires actions on open account to be brought within four years from the time the right of action accrues; Prince's Dig. 578. The plaintiff replied a new promise, made by the defendant's intestate, within four years. In support of the issue joined, upon the plea of the statute of limitations, the plaintiff proved, by one witness, the following conversation between the plaintiff and the defendant's intestate, some two months before his death. Penaro was speaking of quitting Flournoy, who objected; Penaro said, "I want to see my money;" Flournoy said, "I will put up your wages for you." This was the only evidence to take the case out of the operation of the statute of limitations. The jury, under the charge of the court, found for the plaintiff.

The defendant moved for a new trial, upon the following grounds:—

1st. Because there was no proof of any promise made by the intestate, Robert Willis Flournoy, to pay the demand sued for, or any part of it, within four years immediately preceding his death.

2d. Because there was no proof of any acknowledgment of any specific indebtedness, on the part of said Robert Willis Flournoy, deceased, to the plaintiff, within four years immediately preceding his death, sufficient to take the case out of the statute of limitations.

3d. Because the only proof offered, on the part of the plaintiff, to take the case from the operation of the statute of limitations, pleaded in this case, was the testimony of John B. Bacon;

who testified, that some three months before the death of said intestate, he was present at a conversation between the intestate and plaintiff; that plaintiff spoke of quitting Flournoy, who objected. The plaintiff said he wished to see his money; Flournoy replied, "I will put up your wages for you."

4th. Because there being no dispute in relation to the facts proven, to take the case out of the operation of the statute of limitations, the court erred in referring that question to the jury. It then being a question of law, and not one of fact; a question for the court, and not one for the jury.

Mulford Marsh, for the defendant. There being no proof of a hiring, for any specific period of time, the plaintiff's right of action, if any, accrued every day; and the statute applies to all of the account, but the last four years. The statute runs from the time the plaintiff's right of action accrued; *Wilcox v. Plummer*, Ex., 4 Peters' R. 182. To take this case from the operation of the statute of limitations, there must be a promise, within the last four years, to pay this debt, or an acknowledgment of this debt, so direct and explicit, that the law will imply a promise; not an acknowledgment vague, uncertain, and indeterminate. The promise was in these words, (in reply to the plaintiff's saying "I want to see my money,") "*I will put up your wages for you.*" This promise was vague and indeterminate. It may mean the wages for a week, month or year; or it may mean to increase the wages. It refers to no determinate debt or demand; no demand for any specific sum was made, nor were any particular wages named. The promise must refer to the demand sued for, not an unliquidated debt; it must be certain and determinate, not vague. From this promise no particular sum, nor any time of service, can be ascertained. This principle is sustained by the late decisions of the superior courts of Georgia upon this statute, in the following cases: *Fellows v. Guimarin*, Dudley's R. 101; *Brewster v. Hardeman*, ib. 148, 149. The same principle is fully recognised by the supreme court of the United States, in the case of *Bell v. Morrison*, 1 Peters' R. 351; and affirmed by the same court, in *Moore v. Bank of Columbia*, 6 ib. 87. The supreme court of Massachusetts have recognised the same doctrine, in the following cases: *Bangs v. Hall*, 2 Pick. 371, 378; *Gardner v. Tudor*, 8 ib. 205. It is also recognised in England, (in 1816), in the

case of *Rowcroft v. Lomas*, 4 Maule & Selw. 457. And now, in England, the promise must be in writing; statute 9 Geo. 4, c. 14. The same principle is held in New York, in *Purdy v. Austin*, 3 Wend. 187; *Stafford v. Bryan*, 3 ib. 532; *Allen v. Webster*, 15 ib. 284; and *Stafford v. Richardson*, 15 ib. 302. And the same in the court of chancery of New Jersey, in the case of *The Executor of Conover v. Conover*, Saxton's Chan. R. 403.

2dly. There being no dispute as to the facts proven, to take the case from the operation of the statute, it was a question of law for the court, and not one of fact for the jury; *Clarke v. Dutcher*, 9 Cow. 674.

John E. Ward, for the plaintiff. The promise in this case, is such an one as will take the case out of the statute. The plaintiff, as was proven, had been many years in the employ of Flournoy. The plaintiff spoke of quitting. Flournoy objected; plaintiff said, "I want to see my money;" Flournoy replied, "I will put up your wages for you." This promise could only refer to the wages due, and all were due, as no payment was proved. There are two classes of cases that have been decided under the statute. One class of cases have gone upon the ground, that an acknowledgment of the justice of the debt was sufficient, to prevent the operation of the statute. The second class, and the correct one, requires a promise to pay, or an acknowledgment from which the law will imply a promise; 2 Greenleaf on Evid. 352, 355. No set form of words is necessary; a promise may be inferred from acts; 2 ib. 356; 4 Pick. 110.

In support of the position, that the promise was sufficient to prevent the operation of the statute, he relied upon the following authorities; *Executor of Sheftall v. Administrator of Clay*, R. M. Charlton's R. 7; *Bernard v. Bartholomew*, 22 Pick. 291; Ang. on Limit. 258.

As to the second point, this is the true distinction. The court decides what evidence of a promise is sufficient, to remove the operation of the statute; but the fact whether the proof applies to the debt sued for, belongs to the jury. In this case, the court instructed the jury, that if they found the evidence of the promise applied to the whole debt, then they must find for

the plaintiff, or find for the plaintiff as much as they found the promise applied to; *Whitney v. Bigelow*, 4 Pick. 110; 2 Com. Law R. 474.

NICOLL, J. delivered the opinion of the court, in substance as follows: The question, whether the evidence of a promise to pay a debt, barred by the statute of limitations, is sufficient to take a case from the operation of the statute, is one of law for the court. Whether the evidence applies to the debt in suit, or to what portion of it, is a question of fact for the jury. In this case the promise was, "I will put up your wages for you;" clearly referring to the wages then due. The court holds the evidence sufficient to take the case out of the statute, for all the wages to which the promise applied. It was the province of the jury to say to what portion, or whether to the whole of the wages, the promise applied. The promise was absolute: "I will put up your wages for you." The jury having found that the promise applied to the whole account, the court is satisfied that the verdict is correct.

Motion for a new trial overruled.

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 ENGLISH EXCHEQUER OF PLEAS, HILARY TERM,  
 1846.

[From the Western Law Journal, Oct. 1846.]

HART V. PRENDERGAST.

1. The following letter by the defendant, to a clerk of the plaintiff, in answer to one applying for payment of a debt, was held insufficient to defeat a plea of the statute of limitations: "I will not fail to meet Mr. H., (the plaintiff) on fair terms, and have now a hope that before perhaps a week from this date, I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance."

Debt for goods sold and delivered.

Pleas—*Nunquam indebitatus*, and the statute of limitations.

At the trial, before Pollock, C. B., at the Middlesex Sittings, after Trinity term, it appeared that the debt was contracted above six years before action brought, while the defendant was a clerk in the Excise Office. In order to take the case out of the statute of limitations, the plaintiff gave in evidence the following letter, written by the defendant, in answer to an application by a clerk of the plaintiff for payment of the debt:

January 8, 1841.

"SIR—Having no longer any connexion with the Excise, I only this day received your obliging note of the 6th instant, which will account for any apparent remissness on my part, in not either calling on you or earlier replying. I assure you I will not fail to meet Mr. Hart on fair terms, and have now a hope that, before perhaps a week from this date, I shall have it in my power to pay him, at all events a portion of the debt, when we shall settle about the liquidation of the balance."

It was contended for the defendant, that this was not a sufficient acknowledgment to satisfy lord Tenterdon's Act, 9 *Geo.* 4, c. 14. The lord chief baron reserved the point for the opinion of the court, and a verdict was found for the plaintiff for the amount claimed; the defendant having leave to move to enter a verdict for him on the second issue. On a former day, in this term,

LUSH obtained a rule *nisi* accordingly, against which

HUGH HILL now showed cause. It is now fully established that the construction of documents of this kind is for the court, and not for the jury; and upon an examination of the cases, the court will find that acknowledgments, much less equivocal than are contained in this letter, have been held sufficient to satisfy the statute. The defendant fully admits the existence of the debt, and no condition is annexed to that admission. In *Dabbs v. Humphries*, 10 Bing. 446, s. c. 3 Law J. Rep. (n. s.) C. P. 139, the defendant wrote to the plaintiff thus: "I beg to say that I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money, £30 9s. 9d.;" and this was held a sufficient acknowledgment that the sum was due, to take the case out of the statute, although certainly no *promise to pay* was contained in it. In *Bird v. Gammon*, 3 Bing. N. C. 883; s. c. 6 Law J. Rep. (n. s.) C. P. 258, the acknowledgment was in these terms: "I wish I could comply with your request, for I am very wretched on account of your account not being paid: there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it: my hope is, that out of the present harvest you will be paid."



That certainly was a weaker case than the present, yet there the document was held sufficient to satisfy the statute.

[PARKE, B. There must be an acknowledgment of the debt, from which we may infer a promise to pay. If the debtor says in writing, "I admit the debt," that is enough; but if he says, "I admit the debt; *but* I have not made up my mind how or by what means to pay," how can you from that infer a promise to pay?]

The same observation might have been made, and was more strongly applicable in *Bird v. Gammon*. In *Dobson v. Mackey*, 8 Ad. & El. 225, n., the letter relied on was as follows, and was held sufficient: "I can never be happy until I have not only paid you every thing, but all to whom I owe money. \* \* \*

\* Your account is quite correct, and, oh! that I were now going to enclose you the amount of it!" There can be no doubt that this document contains a distinct admission of the debt; and the only question is, whether the other words negative the inference of a promise to pay the debt.

[PARKE, B. No; whether it implies a promise to pay *taken altogether*. The substance of it is—"I owe you the debt, but I really cannot tell when or how I am to pay you, and I refrain from making any promise."]

Rather than he admits the debt, adding, that he thinks he shall pay part of it in a week.

LUSH, *contra*. The present case differs from some of those which have been cited.

[PARKE, B. This evidence is adduced to prove *a promise to pay on request*. An *unconditional* acknowledgment is good evidence for that purpose, because you would infer from it that the party meant to pay on request. But if he annexes any qualification or condition, that is not a sufficient acknowledgment, without proof of the performance of it. The principle is correctly laid down in *Tanner v. Smart*, 6 B. & C. 603; s. c. 5 Law J. Rep. K. B. 218.]

And also in *Cripps v. Davis*, 12 Mee. & Wells, 159; s. c. 13 Law J. Rep. (n. s.) Exch. 217. The questions therefore are, first, does this letter, taken altogether, amount to a promise to pay? Secondly, does it support the promise, laid in the declaration, to pay on request? It is, at most, only the expression of a *hope* that in a week he shall be able to pay; and that

applies only to an *undefined part* of the debt, and at all events would not support the declaration for the whole. As to the residue, he says merely, that he will then *settle about* the liquidation of the balance. No evidence was given of the defendant's ability to pay. How then can this prove a promise to pay on request? *Morrell v. Frith*, *ibid.* 402, s. c. 7 Law J. Rep. (n. s.) Exch. 172, is an express authority for the defendant. There the letter was as follows: "Since the receipt of your letter, and indeed for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." This was held not to be sufficient to defeat a plea of the statute of limitations. Parke, B. says upon it: "The utmost that can be made of this letter is, that it acknowledges the existence of the debt mentioned in the previous letters, but that the defendant does not mean to express any promise to pay, but reserves it for future consideration." The same observation is applicable here.

POLLOCK, C. B. I am of opinion that this rule ought to be made absolute. I gave no opinion upon the point at the trial; but when the cases are looked at, there are some which furnish very strong ground for this application, and it is better to adhere to the principle of some decision, instead of reasoning on the terms of the particular document in each case. Now the case of *Tanner v. Smart* lays down the principle very clearly, on a review of all the authorities, namely, that, "under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and, unless it is conformable to and maintains the promises in the declaration, although it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect." It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall pay at some future time: it should contain either an unqualified promise to pay, that is, a promise to pay *on request*, or, if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition, on the arrival of that period, should be proved by the plaintiff. The only question in the present case is, whether this letter contains a promise to

pay the debt on request. Now, certainly it does not in terms contain such a promise: all that the writer says is, that "he will not fail to meet the plaintiff on fair terms;" what those "terms" may be, I cannot say; and that "he has now a hope that before perhaps a week he shall have it in his power to pay him, at all events, a portion of the debt, when they shall settle about the liquidation of the balance." That liquidation might be his then asking for further time, with or without security. What are the terms to which the defendant alludes, it is impossible to speculate; but there is no promise to pay the whole debt at all, nor to pay a single shilling of it on request, but a mere expression of a hope that he may be able to pay part, and then that they may settle—in what manner does not appear—as to the liquidation of the balance. I am of opinion, therefore, that this letter does not contain a sufficient acknowledgment or promise to satisfy the act of parliament, and therefore that this rule must be made absolute.

PARKE, B. I am of the same opinion. There is no doubt of the principle of law applicable to these cases, since the decision in *Tanner v. Smart*, namely, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay, coupled with a condition, he must show performance of the condition, so as in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of *Tanner v. Smart* put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again. In the present case I agree with the lord chief baron, that, taking the whole document together, it contains no promise to pay any part of the debt on request, but a mere expression of the defendant's hope that in a week he may be able to pay a part of it, and that then the parties may be able to make some settlement for the liquidation of the balance.

ALDERSON, B. I am of the same opinion. We must look to the principle of the cases, although there are some with which it may be difficult to agree upon the particular facts, as in *Gardner v. M'Mahon*, 3 Q. B. Rep. 561; s. c. 11 Law J. Rep. (n. s.) Q. B. 297. Different minds come to different conclusions of fact upon such documents; but the principle is clear, that the plaintiff must prove an acknowledgment conformable to

the promise laid in the declaration, viz., either an unconditional acknowledgment, from which a promise to pay on request is inferred, or an acknowledgment subject to a condition which has been performed, and which then becomes absolute, and so equally maintains the promise laid in the declaration. This document contains neither the one nor the other.

ROLFE, B. I am of the same opinion. The principle is said to be, that the document must contain either a promise to pay the debt, or an acknowledgment from which such a promise is to be inferred. Perhaps it would be more correct to say, that it must in all cases contain a promise to pay, but that, upon a simple acknowledgment, the law implies a promise; but there must, in all cases, be *a promise*, in order to support the declaration.

*Rule absolute.*

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**NOTE.**—Through inadvertence, the first "opinion" in the present Number (that delivered in *Smith and Sloat v. Mercer and Pechin*), has been misprinted as having been delivered in the District Court of the United States. The name of the court should have been thus given—*Circuit Court of the United States, in Equity*—the District Court not having jurisdiction in cases involving questions as to patent-rights.

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THE present Number completes the Fifth Volume of the Pennsylvania Law Journal, and with it the Subscribers' connexion with the work will terminate.

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